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WILLARD C. FOWLER, Direct.

[5] Mr. Silverman: I merely wish to indicate by proceeding at this time I do not want to appear to indicate my readiness to proceed in the event this motion is entertained today or granted today, because this motion to amend which will be shortly before you, Mr. Trial Examiner, is of such a substantive nature it will be necessary to apply for an adjournment in this matter.

I have no objection to the procedure by Mr. Geltman but I do not want my participation in the proceedings at this time to be construed as acquiescent in this proceeding today.

* * * * *

[6] Mr. Silverman: My objection is to the notice of motion offered as General Counsel's Exhibit 1-H, solely as to that [7] paper.

* * * * *

Mr. Geltman: The reason why this motion is made at this time is because, as counsel for the General Counsel, I was not in possession of [8] facts which made it appear to be that a violation had occurred as charged—may I interpolate, both events were charged in the charge filed herein—I was not in possession of facts making it appear a violation had occurred on the earlier occasion until I personally interviewed the charging party for the first time on the evening of last Wednesday, this being Monday.

Up to that time all of the communications concerning this case had been either by letter or by a few telephone calls, the charging party residing in Miami, Florida, and it was impracticable for him to come up or for me to go down in order to properly prepare. I did the best I could with the material I had available, and I just did not know until I saw him that the facts added up to a violation.

* * * * *

Willard C. Fowler—Direct.

[9] Mr. Silverman: Counsel for the General Counsel has given you some of the background. I think, therefore, these additional facts should be borne in mind:

Firstly, this notice of motion was served on us on Friday at approximately 2:45 p. m., and by the amendment it is sought to add to the complaint a charge of an alleged unfair labor practice occurring on a different date than that originally contained in the complaint.

The charge as originally served charged unfair labor practices on both approximately February 27, 1948 and approximately April 26, 1948. Both of those charges were originally dismissed by the Regional Director of this Region. They were thereafter reinstated by the General Counsel; and after that reinstatement and with full knowledge of the facts the original charge had included both dates, the February date and the April date, the Board here, upon the basis of the examination and investigation originally and as well as its investigation subsequent to the action of the General Counsel, saw fit to limit the complaint issued in this matter to the incident occurring on April 26, 1948.

Now, that history is highly significant to my mind. The [10] granting of the amendment at the present time would, in effect, constitute the issuance of a new complaint because the incident—the date—is unrelated; the affect of the amendment would be to require us to defend two cases instead of one. The fact that the named are the same does not alter that fact.

And investigation and the preparation which would be required on our part to defend ourselves against the charge of an unfair labor practice having occurred in February would be expensive. And so, it is our position that this request to amend the complaint at this late date should be denied, in which event we are prepared to proceed; or, if it be granted, that a suitable adjournment be

Willard C. Fowler—Direct.

granted to the union to enable us to properly defend ourselves and interpose such answer as we may wish to any amended complaint and prepare to meet it.

[12] Mr. Geltman: That is right. I intend to show that the granting of a clearance was the union's assent to the employment of a man; the denial of a clearance was the union's denial of the company's right to employ the man.

[15] Trial Examiner Scharnikow: Would it be your position in the course of your defense to assert that the contract language which you would thus urge as a defense is clear on its face?

Mr. Silverman: No, I do not. I will not go so far as to say it is clear on its face. I believe it will have to be supplemented by actual presentation of actual practice and in [16] interpretation given to that clause by the parties to the agreement.

[18] Mr. Geltman: I think it is Mr. Silverman's position—I don't know whether I am right or not—I think he is under [19] the impression that with respect to the first incident not originally alleged, we claim that despite the fact that a job was then filled which the charging party sought to take, the union was wrong in depriving the charging party of that job.

We make no such claim.

Our position is that the job was empty. Now I say this because we have had some off-the-record discussion during which—

Mr. Silverman took the position that a different rule would apply with a job filled.

I agree it may well do so; but that is not our view.

Willard C. Fowler—Direct.

Our view is that there was not a filled job. We are not seeking to impose an obligation here on the theory that even though the job were filled the union was wrong in not clearing the charging party for that job.

* * * * *

Mr Silverman: What Mr. Geltman has just said makes the necessity for my application all the more valid and important because during the course of the long investigation of this case it has never before been asserted, to my knowledge, that [20] the facts as we understood them to be were otherwise than as we understood them to be; namely, that the February incident involved a situation where a member of our union who had been assigned to a particular ship as a permanent assignment had been placed in a position where he was to be deprived of his job in order to make room for the charging party in this case.

For the first time today, I hear a statement to the effect that there is to be a claim that in February, during the occurrence of that incident, the job was not filled or that there was a vacancy.

Certainly I would have to do a great deal to meet such a claim, and as I say, this is the first time that that claim has been advanced.

Trial Examiner Scharnikow: As I take Mr. Geltman's statement—correct me if I am wrong—he is now asserting that on this theory of the case he intends to prove that there was a vacancy on both dates.

Mr. Geltman: Right. A similar situation on both occasions.

Trial Examiner Scharnikow: And that the alleged refusal of the steamship company to employ Mr. Fowler occurred when there was a vacancy which Mr. Fowler could fill.

Mr. Geltman: Right.

Willard C. Fowler—Direct.

Trial Examiner Scharnikow: On both occasions?

[21] Mr. Geltman: On both occasions.

Mr. Silverman: And the point I am making is that this is the first time that has been claimed to be the fact with reference to the February incident.

We never delved deeply into the facts because we thought it was undisputed that at least as far as the February incident was concerned, that another man was aboard the ship when that party sought clearance for that ship.

* * * * *

Trial Examiner Scharnikow: Why should I not permit the amendment to the complaint?

Mr. Silverman: I feel that the amendment to the complaint should not be admitted or motion should not be granted at this time for the reasons that I previously dwelled upon before.

The amendment to the complaint here in effect serves to substitute a new cause of action or at least to add a new cause of action to the cause of action which is alleged in the initial complaint. It injects an entirely separate and distinct occurrence, an occurrence of which the Board was fully advised and fully aware when the original complaint herein was served.

* * * * *

[23] Mr. Silverman: I, of course, except to the granting of that motion.

* * * * *

[29] Mr. Silverman: I object to it on the ground it is not binding on the respondent union.

Trial Examiner Scharnikow: The objection is overruled.

* * * * *

Willard C. Fowler—Direct.

Mr. Silverman: May I have an objection to these questions [30] which refer to conversations had not in the presence of the respondent as not binding on the respondent?

Trial Examiner Scharnikow: I will overrule the objection to the particular question.

Will you raise that from time to time? I am not sure whether or not if subsequent conversations are brought forth through this witness, whether I might not, in some instances, sustain that objection, depending upon what the proposed testimony would be.

[35] Mr. Silverman: Let me see if I make my position clear.

This relates to the February incident, and as I indicated at the outset in connection with my application for an adjournment, there may be certain phases of this February incident as to which proof is now being adduced, that I may not be adequately prepared to meet at this time; and so I wonder if I might have a reservation of objection to this line of questioning; this entire line of testimony with respect to this February incident because possibly the inadmissibility or impropriety of any proof that may be offered in connection with it may not conceivably be fully understood by me without a full and complete grasp of the situation.

Trial Examiner Scharnikow: The continuing objection is permitted.

* * * * *

[40] Mr. Silverman: I am going to object to a conversation between the witness and Mr. Frey with respect to a third party, the radio officer who was aboard the ship at the time, as not binding upon the respondent.

* * * * *

Willard C. Fowler—Direct.

Trial Examiner Scharnikow: I will overrule it.
Mr. Silverman: Exception.

Trial Examiner Scharnikow: I am not taking it
now on the question of whether there was an actual
vacancy.

* * * * *

[41] The Witness: He said he would rather stay on until
the next day and also to clear up the fact—you see, when
I asked him, "Are you going to stay on the ship," and he
says, "I don't know", he says, "I was only supposed to
come up for—bring the ship up for one trip but I want to
stay on if I can."

That is when I told him, I says, "The company is cer-
tainly not going to hire two radio operators."

* * * * *

[48] He gave me permission. And I said, "I will prob-
ably be leaving within a couple of days or so and there
is no other operator assigned to the ship," I said, "This
man is off and I can save hotel expenses by staying on the
ship."

Which Mr. Howe gave me permission to stay on the
ship Saturday night and—I mean—I am sorry—on Tues-
day night. That was Monday morning, and he gave me
permission to stay on the ship Tuesday—Monday night.

* * * * *

[49] A. I was in the radio operator's quarters. The radio
room and the operator's quarters are more or less com-
bined on the—adjoining.

And he came in and he says, "I have been assigned to
this ship as radio officer."

I said, "Did you get clearance from the union?"

And he says, "Yes."

I said, "Well, in that case", I says, "I will get my bags
off."

* * * * *

Willard C. Fowler—Direct.

[53] The Witness: I told him that this man's license had just been issued a month prior to his coming on the ship.

And I said, "Is he qualified for that job?" I says, "I have been out of work longer than that."

I says, "according to his license—he had just got his license on January 23rd."

And he said, "Well, that is no concern of yours," he said, "so just forget about it."

So that is the last conversation I had with Mr. Howe.

* * * * *

[55] Was there anything said between you and Mr. Howe indicating there was a place on the ship where you could stay? A. I told him I was going to stay in the radio operator's quarters.

Q. Was anything said as to whether or not the old radio operator was still there? A. Well, just in the previous conversation I had told him the radio operator had gotten off. * * * [56] I told * * * Mr. Howe—that the baggage had been moved off.

* * * * *

[60] Mr. Silverman: I am objecting again to this particular testimony as being a conversation outside the presence of the respondent, not binding in any way upon the respondent.

Trial Examiner Scharnikow: I will overrule the objection. It may continue.

* * * * *

[65] Mr. Silverman: I object to what somebody else told him not in the presence of the respondent, and I move to strike out that portion.

Trial Examiner Scharnikow: Is it material?

Willard C. Fowler—Direct.

Mr. Geltman: Yes, Mr. Trial Examiner, it relates to his turning down another available job should that contingency ever come up on the question of possible compliance—should it become material in compliance, which it well might, as to whether or not, for example, they offered him an equivalent position.

Trial Examiner Scharnikow: I will overrule the objection.

[66] Mr. Silverman: Exception.

* * * * *

[67] Q. (By Mr. Geltman) Will you look at this please, and tell me what that is? It is General Counsel's Exhibit No. 8 for identification. A. That is the clearance Mr. Glynn gave me.

Q. Did it have this writing in pencil on top when you got it? A. No. I wrote—I found out the name and—

Q. Did it have everything else in it when you got it? A. Yes. Everything except that.

Mr. Geltman: I offer it without the pencil marking on top.

Mr. Silverman: No objection.

Mr. Geltman: I offer it in evidence.

Trial Examiner Scharnikow: General Counsel's Exhibit No. 8 is admitted in evidence.

(The document previously marked General Counsel's Exhibit No. 8 for identification was received in evidence.)

* * * * *

[68] A. She kind of got mad. She brought out an application of employment form for me to fill out.

And I told her I had no papers with me.

Willard C. Fowler—Cross.

And she said, "You are supposed to carry those papers with you."

And I told her I had just arrived back in town and I had the bag with the papers in it checked at the station.

She said, "In that case, you cannot fill it out."

* * * * *

[76] Mr. Silverman: My objection runs likewise to these conversations with Mr. Frey, not in the presence of the respondent.

Trial Examiner Scharnikow: You are not alleging that the statement of the witness repeating what Mr. Howe said to him is 8(b)(3) or 8(b)(2), are you?

Mr. Geltman: As far as we are concerned, the value of what he has just said is limited to this: He told Mr. Frey the union would not clear him. Having seen Frey earlier and having been told by Frey to get a clearance from the union, he now reports he cannot get a clearance.

Trial Examiner Scharnikow: I overrule the objection.

Mr. Silverman: Exception.

* * * * *

WILLARD C. FOWLER, Cross.

[80] Q. When was your first job with the A. H. Bull Line?

* * * * *

The Witness: My first employment with the A. H. Bull Steamship Company was 7-30-43.

* * * * *

[81] Q. Will you briefly describe for us the rotary hiring system that was used by the Radio Officers' Union during the years you were a member of that union?

Willard C. Fowler—Cross.

Mr. Geltman: Objection. It doesn't bear on this phase of the Board's case. It may be relevant to the defense.

Trial Examiner Scharnikow: I cannot hear you.

Mr. Geltman: I say I object on the ground it does not bear on the affirmative case. It may be an element of defense.

Mr. Silverman: The witness referred to the rotary hiring system on a number of occasions during his testimony. I would like to have him explain it.

Mr. Geltman: We do not hang our case on the rotary hiring system.

Trial Examiner Scharnikow: I will sustain the objection.

Mr. Silverman: I respectfully except.

* * * * *

[82] Trial Examiner Scharnikow: You are not arguing that there was some impropriety in the union's departing from its own system, this rotary hiring system, in this witness' case?

Mr. Geltman: No, I am not.

* * * * *

[86] Q. You could also refrained from bidding on that job, could you not? A. Yes, that is correct.

* * * * *

[90] Q. In other words, there was nothing wrong with the ship that caused you to reject the employment aboard the Semmes, was there? A. The ship itself, no.

* * * * *

Q. Will you answer the question, please: Did you have any objection to the run that the Waterman Line, Raphael Semmes was scheduled to make on that occasion? A. I did not know what the run was.

* * * * *

Willard C. Fowler—Cross.

[92] Trial Examiner Scharnikow: You were asked did you hear anything at the office of the union while you were there that [93] morning?

A. That morning, no.

* * * * *

[99] Q. Did you ask for any clearance for a Bull Line ship? A. Not during that conversation, no.

Q. Did you say anything to him about the fact you wanted to sail only on a Bull Line ship? A. Not that particular point, no.

Q. When was the next time you knew anything about an actual opening aboard a Bull Line ship? [100] A. After the conversation you mean with Mr.—

Q. Howe, yes. A. When was the next time I knew of any opening for a Bull Line ship?

I didn't know of any after that conversation.

Q. Did you know of any at that time? A. After the phone conversation, I mean after the conversation with Mr. Frey, I knew there was an opening. There was an opening—

Q. There was an opening expected? A. There was an opening expected, that's right.

Q. There was an opening expected.

When was the opening expected to take place, do you know? A. That I cannot recall.

Q. Did you know aboard what ship this opening was expected to take place? A. Could you repeat that again?

I am trying to connect that with the conversation that I had with Mr. Frey.

Mr. Silverman: Would you read the last question, please, Mr. Reporter?

(Question read.)

The Witness: I do not recall. I do not remember.

Willard C. Fowler—Cross.

I remember there was an opening and—but I cannot just recall that one question you asked.

[101] Trial Examiner Scharnikow: Your only news about their being an opening in the Bull Line ship was what Mr. Frey told you?

The Witness: At that point and at the previous point.

Trial Examiner Scharnikow: That is all your information about the opening on a Bull Line ship was received during this period from Mr. Frey?

The Witness: That is correct.

Trial Examiner Scharnikow: Do you remember whether Mr. Frey told you on what boat he expected an opening, or on what ship; or don't you remember whether he mentioned a ship?

The Witness: I cannot recall too much of that conversation, and I am afraid if I answer it, it might, you know, incriminate me.

Trial Examiner Scharnikow: You cannot say whether Mr. Frey did mention the name of a ship?

The Witness: He mentioned the name of a ship to the nearest of my recollection, but that is—

Trial Examiner Scharnikow: But you cannot remember what that name was?

The Witness: I can—at this point I will say no.

Trial Examiner Scharnikow: But you cannot remember?

The Witness: I cannot remember.

Trial Examiner Scharnikow: The name?

[102] The Witness: The name.

Trial Examiner Scharnikow: But you do recall—

The Witness: There was one.

Trial Examiner Scharnikow: To the best of your recollection there was a mention of a name of a ship?

The Witness: That is right.

Willard C. Fowler—Cross.

Q. (By Mr. Silverman) Your recollection is that Mr. Frey mentioned a specific ship upon which he expected an opening? A. Not particularly, no. He said he has an opening.

Q. He was expecting an opening? A. He either had an opening or he had expected an opening.

Q. Let's review that for a couple of minutes, if we may.

You arrived in New York on April 22nd? A. April 22nd.

Q. 1948? A. Yes.

Q. Which was a Thursday? A. That is correct.

Q. Is that right? A. That is right.

Q. And went directly to the office of the Bull Line, or did you phone Mr. Frey? A. I phoned. I did not go directly.

Q. You phoned Mr. Frey, is that correct? A. That is correct.

[103] Q. And you told him you were back in town, is that right? A. That's right.

Q. And you asked him whether there was anything doing, is that correct? A. That's right.

Q. And he said "Well, keep in touch with me; something might come up in the next few days;" is that right? A. That's right.

Q. So that during the course of that particular conversation he did not mention any particular opening, did he? A. He may have, but I just don't recall offhand.

Q. Didn't he say in general terms, "Keep in touch with me, there may be an opening in a few days"? A. That was the general conversation.

Q. That was the gist of what he said? A. That's right. He may have mentioned the name of a ship, but I just cannot recall at that point.

Q. When was the next time you spoke to Mr. Frey after that? A. After the telephone conversation when I came in town?

..

Willard C. Fowler—Cross.

Q. Yes. A. The next time I spoke to him was—

The next time I remember speaking to him was after I came back off of the Semmes; but I may have spoken to him previous to that. I cannot recall.

Q. I know you may have, but do you have any recollection [104] of speaking to him between this telephone conversation of April 22nd and the personal conversation after you had been aboard the Semmes? A. That's right.

Q. Do you have any such recollection of any such conversation between those two dates? A. I cannot answer that because I don't remember.

Q. Now when you went to the union office on April 26th, 1948, Mr. Howe was not there; is that correct? A. That is correct.

* * * * *

A. I may have said hello to him but that was the extent of the conversation. I don't even recall seeing him.

Wait, wait, Excuse me.

Would you—I am confused.

* * * * *

[106] Q. Bearing that conversation in mind, you appeared at the union office on April 26th in the morning? A. Monday morning.

[107] Q. Is that right? A. That's right.

Q. You had at that time in your mind the information Mr. Frey had conveyed to you, an opening was expected aboard a Bull Line ship; is that right? A. I had it in mind, yes.

Q. With that in mind, and with the conversation you had had with Mr. Howe, Saturday, in mind, you bid for this job on the Waterman Line ship; is that right? A. With the facts in mind, yes.

Q. Did anyone threaten you in any way in connection with your acceptance of this assignment to the Waterman Line on that morning? A. Not at that point, no.

Willard C. Fowler—Cross.

Q. Did anyone threaten you with any consequences if you were to remain at the offices of the union and await a call for a man for a Bull Line ship? A. Not at that point, no.

Q. Did you ever ask any representative of the Radio Officers' Union to give you a clearance for the SS Evelyn? A. Will you repeat that question again?

Trial Examiner Scharnikow: Mr. Reporter, will you please read the question?

(Question read.)

The Witness: I did not exactly ask him. I had it in mind asking for a clearance.

[108] Q. (By Mr. Silverman) I assume from your last answer no one refused to give you a clearance for the SS Evelyn since you never asked for such a clearance, is that correct? A. That is correct.

Q. Had you had any difficulty in your relations with the Union at any time prior to February, 1948? A. Prior to February, 1948?

No.

[109] Q. He had never attempted in any way to interfere with your employment with the Bull Line, had he? A. No, he didn't.

Q. Did you ever attempt to question what Mr. Howe said to you [110] through any of the procedures provided for by the constitution and by-laws of the union? A. No.

Trial Examiner Scharnikow: Did you hear Mr. Frey at any time ask anyone for the union to give you a clearance?

Willard C. Fowler—Cross.

[111] The Witness No.

* * * * *

Q. (By Mr. Silverman) Did you at any time write or wire the union or communicate with them in any written form requesting a clearance to a Bull Line ship on or about April 26th, 1948? A. No, I did not.

Q. During the conversation you testified you had with Mr. Howe on Saturday or Friday, prior to April 26th—
A. With Mr. Howe?

Q. With Mr. Howe? A. That's right.

Q. On the Friday or Saturday prior to April 26th, you had in substance disagreed with him in his views and had taken the position you were entitled to an assignment to a Bull Line ship or any other ship, isn't that so? A. That is correct, yes.

[112] Q. So that you had had something of an argument or a discussion with him with respect to your rights to an assignment aboard a Bull Line ship? A. It was not an argument. It was a discussion.

Q. And you advanced the thought during the course of that discussion that as a member in good standing you were entitled to an assignment to a Bull Line ship, or any other ship you might select; isn't that so? A. That is correct.

Q. Having taken that position on the Friday or Saturday before April 26th, 1948, was there any reason why you did not follow through on that position in some concrete form?

Trial Examiner Scharnikow: Do you understand that question?

The Witness: Yes, I understand.

Trial Examiner Scharnikow: I am not sure that I understand it, nor will I understand an answer to that question.

Willard C. Fowler—Cross.

Mr. Silverman: It is vague.

Trial Examiner Scharnikow: Yes.

Read it back, please, Mr. Reporter.

Mr. Silverman: I thought the witness might gather my meaning, and his answer may supply the necessary clarity to it. It is an ambiguous question.

Trial Examiner Scharnikow: Do you want it read back?

Mr. Silverman: Yes, please read it.

[113] (Question read.)

Q. (By Mr. Silverman) Do you understand that question, Mr. Fowler?

The Witness: Yes, I understand the question, but it has got me up a tree.

• • • • •

I can say that I see your point in bringing it out.

• • • • •

[114] Q. Did you, after this conversation with Mr. Howe, attempt to appeal to the general chairman of the union or to the general committee of the union concerning Mr. Howe's position in the matter? A. No. I did not because they were not available at that point, at that particular point.

Q. Whatever pressure had been applied as you have described it, had been applied prior to this Friday or Saturday preceding April 26th, isn't that so?

Trial Examiner Scharnikow: That is Monday, April 26th; prior to Monday, April 26th.

Q. (By Mr. Silverman) Yes. On the Friday or Saturday prior [115] to Monday, April 26th.

Isn't that so? A. That is correct, yes.

Willard C. Fowler—Cross.

Mr. Geltman: I don't think the witness got the question with so many interruptions. Will you repeat it, please?

Trial Examiner Scharnikow: I think I perhaps interrupted. Let's hear the question again and let the witness answer it.

(Question read.)

Mr. Geltman: That is, had been applied prior to the Friday or Saturday.

Q. (By Mr. Silverman) On or prior? A. On or prior to the—

Q. On or prior to the Friday or Saturday preceding April 26th? A. Yes, that is so.

Q. There was nothing that happened in between Friday or Saturday preceding April 26th and April 26th, was there? A. Between Friday or Saturday preceding April 26th and April 26th?

Q. Let me simplify it. You have expressed some doubt as to whether this conversation took place on a Saturday or Friday. Do you mind if I refer to it as a Saturday, because I think that was your direct testimony. I think that will [116] simplify it.

Was there any pressure applied to you between Saturday, April 24th, and Monday, April 26th? A. No.

Q. You had no contact with Mr. Howe? A. I had not, that's right.

* * * * *

[118] Q. And you indicated to no one in the union office you were there for the purpose of taking an assignment aboard the Frances? A. That's right.

* * * * *

[122] Q. When you said you had come on the basis of his letter of the 25th, 1948, did you at that moment have

Willard C. Fowler—Cross.

anything in mind about your desire or willingness to take an assignment aboard a ship of some company other than the Bull Line? A. I had nothing in mind at that point, no.

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[123] Q. During the course of that conversation, after he had [124] discussed it with you, didn't it also become your viewpoint that you would benefit by a change of companies? A. I don't recall that. Whether—I mean, that particular thing, no.

Q. When you finally left— A. I mean that was his idea of trying to get me to change away from the Bull Line, but—

Q. Didn't you agree with him at that time? A. Not particularly, no.

Q. Not particularly.

Trial Examiner Scharnikow: What do you mean by that, Mr. Fowler, "not particularly"?

The Witness: The idea of it was—I mean he was trying to change—I saw Mr. Howe's point of view. He figured that was his only way out, to get me to change.

Trial Examiner Scharnikow: The specific question is, did you or did you not say to Mr. Howe you agreed with him that it would be better for you to change lines?

The Witness: I do not recall saying that I agreed with him, no.

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[125] Q. In other words, when you parted with Mr. Howe after this February incident, the entire misunderstanding with respect to the Frances had been straightened out? A. No, it had not been. It had not been exactly straightened out, but it had subsided to a point.

Willard C. Fowler—Cross.

Q. It subsided to the point where you said, "Okay, we will let the whole matter drop," isn't that so? A. Yes, I said that.

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[130] Trial Examiner Scharnikow: I am disposed to grant an adjournment until next Monday. I think I will start the hearing at ten o'clock in the morning and we will get moving as fast as we can. That is what I intended to do.

Do you have any objections to that?

Mr. Silverman: My sole objection is that the adjournment is not sufficient, to my mind, to enable me adequately to meet the allegations of the amended complaint. And I will renew my application for a minimum adjournment of two weeks. And I have deliberately been conservative in fixing my request at two weeks because I have borne in mind the situation of the charging party and not because I feel that that will necessarily be adequate for the purposes of my proper preparation of the defense of the respondent.

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[138] Q. Now I ask you whether it is not a fact you now know this telegram, Exhibit 4, was dispatched to you as a result of a complaint made to the union by Mr. Kozel. A. Evidently, yes.

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[148] Q. Now, did you know what your position on the rotary hiring list was on February 26 or February 27 as compared with the position held on that list by Mr. Miller? * * * [149] A. I would say I was—I am saying that I was leading him; that is, I had preference over him.

Willard C. Fowler—Cross.

And how I establish that fact was by a conversation with him and also noting the time that his license was issued.

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[150] Q. Did you know that Mr. Miller had been a member of the union since March 14, 1937, and held certificate Number 31 in the union? A. No, I did not.

Q. If I tell you that is the fact, would that have any influence upon your understanding as to the length of time that Mr. Miller had held a radio officers' license? A. Yes.

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[160] Q. (By Mr. Silverman) Is it not a fact that during that conversation with him, you made the statement to him in words or substance to this effect, and I quote:

"If you are going to stay on," referring to Kozel, "I will forget about it."

A. Yes. I said that. That is when I told him to go down to the union the next morning and get it straightened out and I would be back later to see what his final answer was.

Q. As a matter of fact did you not also during the course of that conversation say to Mr. Kozel that you were going back to your hotel and that he should stay aboard? A. Yes, I said that.

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[165] Q. Did you during all the period of this February incident know that the contract in existence between the Radio Officers' Union and the Bull Steamship line contained a provision to the effect that no radio officer could be discharged except for just cause?

Mr. Geltman: I object. It is immaterial what the witness understood.

Trial Examiner Scharnikow: I will sustain the objection.

Mr. Silverman: Exception.

Willard C. Fowler—Cross.

Q. (By Mr. Silverman) you were aboard the Frances on both February 27 and February 28, were you not? A. That is Friday and Saturday? Yes, that is correct.

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[171] Q. When had you arrived in town prior to April 26? A. Can I refer to my—

[172] Mr. Geltman: You may refresh your recollection.

The Witness: That is, of the April incident, is it, Mr. Silverman?

Mr. Silverman: Yes.

The Witness: I arrived in New York on April 22.

Mr. Geltman: That is a—

Mr. Silverman: Thursday.

Mr. Geltman: Thursday.

Q. (By Mr. Silverman) Where did you go? A. After getting off the train I went to a hotel.

Q. What hotel? A. Can I ask a question?

Trial Examiner Scharnikow: Do you remember what it was?

The Witness: It is a little hazy. It could have been one of three hotels.

Trial Examiner Scharnikow: You don't remember which one?

The Witness: I know which one—I know the most likely one I would have went to, but I would not—I mean I cannot swear to it. The reason why—

Trial Examiner Scharnikow: You have answered the question. Let Mr. Silverman proceed.

Q. (By Mr. Silverman) Which of these three hotels do you believe it was, Mr. Fowler? A. Do I have to answer—give the name of it?

Willard C. Fowler—Cross.

Trial Examiner Scharnikow: If you can give the name of [173] the three hotels, one of which you might have gone to, go ahead.

The Witness: I cannot even recall the name. I tell you which hotel it was. It was the hotel—

Trial Examiner Scharnikow: All right, if you cannot—

The Witness: It could have been the hotel that was torn down, it is right across from the McAlpin Hotel on 34th—on 33rd and Broadway, because there is a vacant space in there.

Trial Examiner Scharnikow: Martinique?

The Witness: Martinique, that is the one that is torn down? That is the most likely hotel I would have went to.

Q. (By Mr. Silverman) What are the other two that it might have been? A. One is in Brooklyn. I cannot remember the name of it.

Trial Examiner Scharnikow: Saint George?

The Witness: No, it was not. It was in the Borough Hall section but it was right down near the waterfront. It is a pretty large hotel.

Q. (By Mr. Silverman) What about the third possibility?

A. The third was the Kenmore Hall.

Q. Which is where? A. That is on East 23rd Street.

Q. You remained at that hotel on Thursday, did you?

A. Yes.

Q. Did you remain there on Friday? [174] A. Yes.

Q. And on Saturday morning? A. This is—

Q. Give—

The Witness: Go ahead. I am sorry. Excuse me.

Willard C. Fowler—Cross.

Q. (By Mr. Silverman) What were you going to say?
 A. The question was, you were going to ask me about the incident.

Trial Examiner Scharnikow: Wait until you are asked. Let me have it clear in my mind: This is the second trip to New York, in April.

The Witness: In April, that is right.

Q. (By Mr. Silverman) You remained at the hotel, whichever one it was, on Thursday night, which would be April 22? A. That is right.

Q. And you remained there on Friday night which would be April 23; is that right? A. That's right.

* * * * *
 I won't change—I cannot remember. I mean I had no reason to remember it. [175] I mean there was no basic reason for me to remember whether it was Friday or Saturday.

Q. Do you remember what time of the day it was on either of those days? A. Yes, it was in the morning.

Q. At about what time? A. Well, I cannot give you the exact hour because I don't remember that.

Q. Approximately? A. I would say approximately 9:30 to 10 o'clock.

Q. And how did you travel to the union on that morning, do you recall?

Trial Examiner Scharnikow: This was on Saturday morning.

Q. (By Mr. Silverman) On either Friday or Saturday?
 A. Friday or Saturday.

Q. You are not definite? A. Most likely by subway.

Q. Do you remember which subway you took? A. It

Willard C. Fowler—Cross.

was most likely the BMT because that is the station nearest the Radio Officers' Union exit at 1440.

Q. Do you recall whether you traveled uptown or downtown? A. I traveled uptown. I mean I am definitely sure of that.

Q. Do you recall what station you got on? A. No, I cannot recall what station I got on.

Trial Examiner Scharnikow: Where is the union's office?

[176] The Witness: It is at 1440 Broadway. That is 41st Street and Broadway.

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[184] Q. And as you sit on the stand you have no recollection of where you stopped during this period in April that you visited the office of the union on these two occasions? A. I have no recollection.

Excuse me. I withdraw that. Excuse me.

You state that I said I have no recollection. I did not say that. I says I stopped at one of three hotels.

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[185] Q. Was it on the following day that you went to the United Fruit Line and the Socony Vacuum to apply for work? A. Yes, I think that is correct.

Q. Were you aware of the fact that the Standard Oil Company or Socony Vacuum assignment was made at the same time as the assignment was made to the S.S. Raphael Semmes? A. No. I was not aware of that.

Q. What tanker was this on which there was an opening on April 26? A. I cannot recall the name of the tanker or anything. All that was mentioned, there were two—all that was mentioned by Mr. Glynn, as near as I can remember, was there were two jobs available on the previous—on Monday, but I cannot remember the name or what tanker it was or anything about it.

Willard C. Fowler—Cross.

Q. You had no objection to working for the Standard Oil Company, did you? [186] A. Yes, I did.

Q. You did? A. I mean I am not—I withdraw that. I didn't prefer tankers. I mean I will change the answer to that and say that I preferred working on cargo vessels—in relation to tankers.

Q. What sort of vessels does Socony Vacuum operate? A. Tankers.

Q. You went down there to apply for a job. A. That is correct.

Q. Did you intend to take a job if one were available? A. Yes.

Q. Do you know that virtually every day after April 26th assignments were being given out in the office of the union to ships of various companies, including ships of Socony Vacuum? A. Yes.

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[187] Trial Examiner Scharnikow: There is no question that if and when the Board should decide to issue an order, it should be taken up on compliance as to the extent of any loss of earnings award that might be made.

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[189] Trial Examiner Scharnikow: And you would concede there was no other discrimination against this man with reference to his employment in the normal rotary hiring system as far as other companies are concerned?

Mr. Geltman: I do not allege any discrimination with reference to other companies.

Trial Examiner Scharnikow: I did not ask that. I can assume there was no discrimination, for what it is worth; isn't that right?

Mr. Geltman: Yes.

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Willard C. Fowler—Cross.

Q. (By Mr. Silverman) Did you ever ask for a clearance for the S. S. Evelyn, Mr. Fowler? A. To name the particular ship, no. I mean to say the S. S. Evelyn, no.

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[191] (By Mr. Silverman) Referring to the February incident, Mr. Fowler, when you called the union to advise them that Mr. Miller had shown up aboard the ship, what else did you say? And what was the purpose of that call?

Trial Examiner Scharnikow: First, what else did you say?

Q. (By Mr. Silverman) What else did you say? A. After I advised that Mr. Miller was aboard the ship? After I advised him that Mr. Miller was aboard the ship—

Q. When you say "him" you are referring to Mr. Howe? A. Yes. I am referring to Mr. Howe, that is right.

Then I said to Mr. Howe, I says, "I noted by his license that it had just been issued the month prior, it was just a [192] month old." I says, "Doesn't that put me ahead of him?"

Mr. Howe replied, "That is no concern of yours."

Q. And when you said, "Doesn't that put me ahead of him," that was in the nature of a complaint as to the propriety of giving Mr. Miller the assignment rather than you, was it not? A. Yes. I will say that it was in substance the nature of a complaint.

Q. In short, you were looking to the union to enforce certain rights which you felt you had in preference to any rights Mr. Miller might have had at that moment? A. Of Mr. Miller?

Q. Yes. A. Yes, that is correct.

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Robert H. Frey—Direct.

WILLARD C. FOWLER, Re-direct.

[206] Q. (By Mr. Geltman) Did you in fact know during the week you were in town during the April incident that the job was a job on the Evelyn? A. No. I cannot recall whether it was—exactly the name of the ship, whether it was the Evelyn or not. I mean, I cannot recall just exactly the name of the ship was the Evelyn but I knew there was a job open.

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WILLARD C. FOWLER, Re-cross.

[208] Q. In any event, you never asked for a clearance for any specific ship? • • •

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A. I did not.

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ROBERT H. FREY, Direct.

[228] Trial Examiner Scharnikow: Let it be understood that any statement by the witness in answer to Mr. Geltman's questions in which the term "offer of job" was used shall not be considered either by the Board or by the Trial Examiner as characterizing any part of the conversations between Fowler and the witness and that the testimony of the witness as to what was said shall be the basis and sole basis, so far as this witness is concerned, of what happened.

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ROBERT H. FREY, Cross.

[229] Q. Do you have any indication in your file in any manner or [230] form that—to the effect that the assign-

Robert H. Frey—Cross.

ment of Mr. Kozel to the Frances at New Orleans was anything but a permanent assignment? A. No.

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[232] Q. In any event, you told Mr. Kozel you had made arrangements then for a man to come up to replace him, Kozel? A. Yes, that is right.

Q. And he seemed to be perturbed about that? A. He seemed somewhat perturbed. He was not too overly excited.

Q. He did not accept that with good grace? A. Well, I would say not quite that way, no.

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Q. You suggested to him that he make a complaint to the union? A. I made the suggestion that he call up the union about it.

Q. You told him in the course of that conversation his services were satisfactory? A. Oh, yes. He knew that.

Q. You had in mind at that time, did you not, Mr. Frey, that under the provisions of the agreement between the Bull Line Steamship Company and the union that no man is to be discharged except for cause. A. That is in the agreement, that is right.

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[233] Q. (By Mr. Silverman) What was it that he said that indicated to you he was perturbed about your statement you had sent for a man to replace him? A. Well, I would not know. He did not say anything in particular as to why. On surface appearance only, I would say, he did not like being relieved.

In fact, he was never discharged from his job.

Q. Except to the extent you told him you had sent for a man to replace him? A. He could have still stood on the grounds he wanted to stay there.

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Robert H. Frey—Cross.

[237] Q. Before Mr. Fowler left for Miami, he telephoned you to tell you he was leaving for Miami, is that right? A. That's right.

Q. Did he during the course of those few days prior to his departure for Miami tell you anything in words or substance to the effect that if he knew that Mr. Kozel had been assigned to the ship, he would not have come up from Miami? A. Not in that many words, no. Not exactly that way. But he did mention when he found out that Kozel was there and he was objecting to the union about being replaced—well, he would just skip it and return to Miami.

Q. In other words, he was not interested in pressing any issue as to whether or not he was entitled to replace Kozel or not; he was rather inclined to "skip it," as I think you put it; is that right? A. You might say in that way, yes. In other words, he did not want to create any trouble.

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[238] Q. And he had taken the position that rather than create any additional unpleasantness as a result of Kozel's attitude that he would prefer to forget about the whole thing and go back to Miami, isn't that so? A. That is what I would gather from it, yes.

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Q. Did you ask him where he was staying? A. He mentioned at the time he didn't know where he was going to stay. I did mention if he found out where he was going to be, he should let me know.

[239] Q. Did he ever let you know where he was going to be? A. No, he did not.

Q. And on the occasion that you have mentioned of that first telephone call, did you mention any specific opening to him that you had? A. Not when he first called me when he came in town, no, I did not. I was not aware of one then.

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Robert H. Frey—Cross.

[243] Q. Did Mr. Fowler say anything to you on that occasion about having been out to look at the S. S. Raphael Semmes? A. No, he did not mention that to me. As far as my knowledge goes, I don't recall him mentioning it.

Q. Did you have any impression that he had been aboard a Waterman ship? A. No.

[245] Q. Was there anything said about back pay on the occasion of Mr. Fowler's visit in February? A. No.

[246] Q. In other words, at the time he came up at the end of February, 1948, would it not have been possible at that time to ascertain whether there was any back pay due him relating to voyages taken prior to January 2, 1948? A. Yes. He could have checked on it at that time if he wanted to.

Q. Now it frequently occurs, does it not, Mr. Frey, that a man who is aboard a vessel will, at the conclusion of that voyage, sign off ships articles and then sign on again? A. Yes.

Q. So there was nothing about Kozel's signing off articles on February 26 that precluded his again signing new articles for the subsequent voyage? A. No, I would not say so.

[261] So that the fact a particular man signs off ship's articles is not indicative of the fact he is severing permanently his relationship with that ship, is it? A. No, I would not say so.

[264] Q. You were aware of the fact, were you not, that the Bull Line was obligated to get a clearance from the

Fred M. Howe—Direct.

union before assigning a man to the ship, is that so? A. According to the agreement, yes.

Q. According to the agreement. And that word "clearance" in the contract appears in quotations, doesn't it, Mr. Frey? A. I am quite sure it does. May I see that?

Trial Examiner Scharnikow: It so appears from the contract.

Q. (By Mr. Silverman) And that has a pretty definite meaning and pretty definite connotations? A. I would say it would emphasize that.

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FRED M. HOWE, Direct.

[283] Q. Where, in the constitution or by-laws, do you have any such right?

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Mr. Silverman: I don't think this is a proper forum for the determination of the intraunion rights of the members or officers of the union. There is procedure established for the determination of this question within the union that every member has recourse to; and I do not think it is the province [284] of the Board to determine the propriety or lack of propriety of any action taken by an officer of a union with respect to a member.

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[289] The Witness: Section 7, Article 7: "The general secretary-treasurer shall act as general chairman in all absences of the General Chairman."

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Fred M. Howe—Direct.

- [291] And so that my position on the record may be complete, Mr. Trial Examiner, may I state it as my position that even in the absence of any such provision in the constitution and by-laws, it would be the inherent right of any union to take the action taken here on the facts as brought to the attention of the union officer here.

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- [301] What day was this you had this conversation we have been talking about?

The Witness: My recollection was it was Friday. Friday afternoon.

Q. (By Mr. Geltman) Is it your testimony you really thought Fowler was going home that night to Miami? A. He said he was going home, yes, I presumed he would go home.

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- [303] Trial Examiner Scharnikow: I did not put it very well, I admit that.

In the normal situation you got a call from a steamship company to the effect that they needed a radio officer; that is right?

The Witness: Yes, sir.

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- [304] Trial Examiner Scharnikow: In view of the time fixed by the steamship company.

The Witness: Yes. What we do in actual practice, say Mr. Fowler gets to be number ten on the list. We write to Mr. Fowler—maybe answer his letter—they usually write to us first. We tell Mr. Fowler he is number ten and he can ship out anytime. He can ship out as easily with number ten as he can with number one, just as easily. So we

Fred M. Howe—Cross.

try to have these men who are on top of the list make themselves available for employment. If they want jobs, they have got to be where the jobs are.

Trial Examiner Scharnikow: By making themselves available, you mean come to New York and be within call of your office.

The Witness: That is right. We cannot possibly assign a man who is not in New York for a ship in New York. If he is in Miami, unless the ship is going to be here longer than the usual ship is—and the average call for a man to go aboard the ship is right away. In practice it is the same day, same [305] afternoon, with exceptions of course.

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[308] Trial Examiner Scharnikow: In other words, when you send a man out, you give him two forms: one of the type of General Counsel's Exhibit 8, and the other of the type General Counsel's Exhibit 10, which is the blue form.

The Witness: Yes, sir.

Trial Examiner Scharnikow: In every case.

The Witness: In every case.

Trial Examiner Scharnikow: The blue form of the type [309] General Counsel's Exhibit 10 is to be delivered to the steamship company.

The Witness: That is right.

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FRED M. HOWE, CROSS.

[310] Q. Did you have any other reason for believing that Mr. Fowler was aboard the Frances other than what Mr. Kozel had told you? A. I had no other way of knowing.

Q. Up until the time when Mr. Kozel told you and complained of the fact he was being discharged or replaced

Fred M. Howe—Cross.

aboard this vessel, did you have any feeling of bias or ill will or discrimination in any form—and I make those words as broad as I know how—against Mr. Fowler for any cause whatsoever? A. No. I had always thought Mr. Fowler was a very fine fellow. Still think he is personally.

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[314] Q. (By Mr. Silverman) Now these rules which were in force in the New York office, Mr. Howe, functioned, as you have described to some extent in answer to questions by the Trial Examiner, I would like to clarify that a bit more if I may.

Is it a fact that when a man left a ship the date of quitting that ship became his shipping date? A. That is correct.

Q. And the man with the oldest shipping date would have first call on any job that might be available; is that right? A. He would be entitled to the job if he is available.

Q. If he is available.

As a practical matter, many members of your union, after leaving a ship, prefer to either make a vacation ashore or possibly attend to some other business and so do not always make themselves available for immediate reassignment; is that right? A. Very few of the members ship out immediately after their arrival.

Q. The membership of the union is constantly kept advised, is it not, of the approximate period of time—waiting time—that elapses between the last shipping date and the date of a new assignment; is that so? A. Yes. Every member who is waiting for a job has been advised of the approximate date when he may ship out.

[315] Q. As a practical matter, when a member of the union, after leaving one ship, reaches the point where he is about ready to ship out again, if he lives some distance from the union office he will, I assume, write or telephone

Fred M. Howe—Cross.

or communicate with you in some way for the purpose of ascertaining about how soon he could obtain an assignment; is that so? A. The average member contacts us many times from, say, a week or two weeks after he gets off the ship; he writes or telephones or sends telegrams until he is ready to ship again or until we are ready to ship him out.

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[320] Q. (By Mr. Silverman) That was so, was it, in the days when there was virtually no time lapse between availability for employment and actual ability to get a job?

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The Witness: Yes.

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[322] Q. When Fowler left you after this conversation you described in some detail, was the atmosphere friendly or was there any animosity? A. This is the February incident you are talking about?

Q. Yes. A. Yes, very friendly.

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[323] Q. (By Mr. Silverman) Let me ask you this question, Mr. Howe: When, in that letter which is General Counsel's Exhibit 6, you refer to a change of companies, did that have reference to the conversation or the portion of the conversation you have testified to with Mr. Fowler in which he agreed with you that there were advantages to diversifying his experience?

Mr. Geltman: Same objection.

Trial Examiner Scharnikow: I will sustain the objection.

Mr. Silverman: Exception.

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Fred M. Howe—Cross.

[325] Q. Do you have any recollection of any incident at which you called Mr. Glynn into your office and requested he act as a witness to an offer of a job to Mr.— A. No, sir.

Q. (Continuing)—Fowler? A. No, sir.

[327] Q. (By Mr. Silverman) Mr. Howe, were you present in the office of the union on the morning of April 26, when the assignment to the S. S. Raphael Semmes was made? A. No, sir.

Q. Had you had any conversation with Mr. Fowler personally to the best of your recollection prior to the telephone conversation that you had with him on the afternoon of April 26, 1948, and I am referring to the April incident now? A. No, there were no conversations. I did not see him. Did not see the man at all during the month of April.

[331] Q. Did you during the course of this telephone conversation with him on April 26, 1948, have any knowledge of where he [332] was staying? A. No. He did not tell me and I did not ask him.

Q. Referring to the assignment you made on the 26th of April, 1948, can you tell us whether one of those assignments—

Trial Examiner Scharnikow: Are they exhibits now or are they personal papers of the witness?

Mr. Silverman: No, I don't think so.

Q. (By Mr. Silverman) Can you tell us by refreshing your recollection from your assignment records in any way whether an assignment was made on the 26th of April, 1948, to a tanker of the Socony Vacuum Oil Company?

Mr. Geltman: Objection.

Fred M. Howe—Cross.

Trial Examiner Scharnikow: This is on April 26th, isn't it?

Mr. Silverman: Yes.

Mr. Geltman: It does not apply to withholding of the job or offering of a job to Mr. Fowler.

Trial Examiner Scharnikow: What is the purpose of that, Mr. Silverman?

Mr. Silverman: There is testimony, as I understand it, Mr. Trial Examiner, of a willingness on the part of Fowler to work for the United Fruit Company or the Standard Oil Company of New York or Socony Vacuum.

Trial Examiner Scharnikow: Whose testimony was that?

Mr. Silverman: Mr. Fowler's testimony.

[333] Trial Examiner Scharnikow: Wasn't his testimony to the effect he did not want to work on a tanker but wanted to work on a cargo vessel?

Mr. Silverman: No. He testified he went to the Socony Vacuum for employment and they operate tankers.

Trial Examiner Scharnikow: Let's see what Mr. Silverman has on his mind.

Mr. Geltman: That is on the compliance question.

Mr. Silverman: No, it is not.

Trial Examiner Scharnikow: Let's see what Mr. Silverman has on his mind.

Mr. Silverman: It is more than the straight compliance question, Mr. Trial Examiner. He testified he declined the job aboard the Waterman Line ship because of some labor trouble he was told by somebody existed on the ship. This is an attempt to show there is an opening aboard a Socony Vacuum ship that he likewise had first choice on on that day.

Mr. Geltman: I will withdraw the objection.

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Trial Examiner Scharnikow: Go ahead. Let's see what develops.

Q. (By Mr. Silverman) Mr. Howe, do your records show whether an assignment was made on the 26th of April, 1948, to a ship of the Socony Vacuum Oil Company? A. Yes.

Q. Was such an assignment made on that date? [334] A. Yes.

Q. What was the name of the ships? A. Stony Point a T-2 tanker.

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[340] Trial Examiner Scharnikow: * * * [341] Are you free to make any statement, Mr. Silverman, as to whether or not there was any break in the good standing of Mr. Fowler's membership in the union other than this break on February 27th?

Mr. Silverman: Well, Mr. Trial Examiner, the answer that I may briefly give to that is as follows: Good standing in the union has always had an interpretation that was not necessarily limited to the question of whether a man was paid up in his dues or not. There are likewise various types of good standing. A man may be in good standing for certain purposes and not for certain other purposes. Thus, for example, a man who is paid up in his dues may request assignment or maybe, because of his priority in shipping date, may seek assignment to a ship; if the man at that particular moment is under the influence of liquor, if something else exists in connection with him that would make

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assignment to a particular ship or the granting of a clearance improper, that is something which the union has always taken into consideration as determining good standing for that particular assignment or for that particular purpose as well as the question of non-payment of dues and initiation fees. I am referring, of course, now, to the period prior to August, 1948.

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[345] Mr. Geltman: I have no further witnesses at this time. I rest. That is, general counsel rests.

Mr. Silverman: Now at this time, Mr. Trial Examiner, the respondent moves to strike out all testimony given by Mr. Fowler and by Mr. Frey relating to any conversations had between Mr. Fowler and Mr. Frey or Mr. Fowler and any member [346] of the Radio Officers' Union and between Mr. Fowler and any person or persons aboard either the Steamship Frances or the Steamship Evelyn except insofar as such conversations were testified as having been brought home to Mr. Howe or to Mr. Glynn, on the ground that any such conversations not brought home to Mr. Howe, not brought home to Mr. Glynn, are not binding in any way upon the respondent and were not in the presence of the respondent or shown to have been brought home to any representatives of the respondent.

Trial Examiner Scharnikow: We have taken the testimony. Some of the grounds of your present motion to strike have already been urged as objections and some have not.

I am going to deny the motion without prejudice to your arguments as to the materiality and relevance of any of the conversations.

*Motion to Strike Out Testimony.
Motion to Dismiss Complaint.*

Mr. Silverman: And I respectfully except.

Now, I move to strike all testimony to which objection was made and the testimony of the type to which objection was made under a general objection, which testimony was taken by the Trial Examiner subject to connection and subject to a subsequent motion to strike.

Trial Examiner Scharnikow: Same ruling on that. I will deny the motion.

Mr. Silverman: Exception.

I now move to dismiss the complaint on the ground that [347] the facts adduced by counsel for the general counsel have wholly failed to sustain the allegations of the complaint.

Trial Examiner Scharnikow: I will deny that motion without prejudice to its renewal by an appropriate motion during the balance of the hearing and also on argument at the close of the hearing.

Mr. Silverman: Mr. Trial Examiner, would you care to hear argument on that motion at the present time?

Trial Examiner Scharnikow: I do not believe so.

Mr. Silverman: Then I will except to the denial of my motion at this time.

Trial Examiner Scharnikow: You see, actually we have only a comparatively few incidents here. The hearing has been short.

You may proceed.

Mr. Silverman: Mr. Howe, will you take the stand, please.

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Fred M. Howe—Direct.

FRED M. HOWE, Direct.

[349] Q. Mr. Fowler has testified here that on or about March the 2nd, I believe it was, when Mr. Miller—after Mr. Miller had been assigned to the Steamship Frances he telephoned you and stated in substance that the new man had come aboard the ship and that the new man had a license which was only one month old, and that he, Fowler, had been out of work longer and that you stated to him that that was no concern of his. Did you have any such conversation with Mr. Fowler, to the best of your recollection? A. No, sir. No such conversation took place.

Q. Did you after your conversation with Mr. Fowler subsequent to the sending of the telegram receive any word from Mr. Fowler to lead you to believe that he had not returned to Miami as he had stated he was going to? A. No. There was no word from him directly or indirectly. I assumed he had gone to Miami.

Q. And was that your understanding and your belief at the time that Mr. Miller was assigned to the Steamship Frances? A. Yes, sir.

Q. Now, will you please tell us by reference to your records what Mr. Miller's last shipping date prior to his assignment to the Frances was? A. It was November 17, 1947, which was the day he left the Moline Victory operated by Seas Shipping Company at Baltimore. [350] That became his shipping date and that determined his position on the shipping list.

Trial Examiner Scharnikow: Is that the date he shipped on that voyage?

The Witness: That is the date he left the ship.

Trial Examiner Scharnikow: Left the ship?

The Witness: He quit the ship.

Fred M. Howe—Direct.

Q. (By Mr. Silverman) That date corresponds, for example, with the date of January 2, 1948, which was the date on which Mr. Fowler had left the Hilton; is that correct? A. It corresponded in this effect, that Mr. Fowler's position on the list would be determined by the date he left the Hilton.

Q. And when the date of January 2 is referred to as Mr. Fowler's shipping date— A. Yes.

Q. (Continuing) —by reason of the fact he left the Hilton on that date, is that correct? A. Yes.

Q. Mr. Miller's shipping date is determined the same way as November 17, 1947, that being the date on which he had left the Moline? A. Yes.

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[351] Q. In the practical operation and the interpretation of the agreement between the Radio Officers' Union and the various companies which are signatory thereto, has any company, and I include in this question the Bull Line Company, ever maintained that the union was obligated to grant a clearance to a man who was paid up in his dues, regardless of what other considerations might exist for a refusal to issue a clearance?

Mr. Geltman: Objection.

Q. (By Mr. Silverman) (Continuing) For example—

Mr. Silverman: May I just finish the question?

Mr. Geltman: I am sorry.

Q. (By Mr. Silverman) (Continuing) For example, when the union might know that the granting of such a clearance would imply consent to the discharge of another man.

Mr. Geltman: Objection. The agreement speaks for itself.

Fred M. Howe—Direct.

Trial Examiner Scharnikow: I have a difficulty with the question, Mr. Silverman.

I am going to sustain the objection.

I should state that I am sustaining the objection on the ground urged by Mr. Geltman.

Mr. Silverman: The ground being that—

Trial Examiner Scharnikow: That the agreement, Section 6 of Article 1, Respondent's Exhibit No. 2, is the controlling contract provision.

Mr. Silverman: Does your ruling imply, Mr. Trial Examiner, [352] that the agreement is complete and unambiguous in its terms so that proof of practical operation and interpretation by the parties would be inadmissible?

Mr. Geltman: The agreement sets out the relevant provision.

Trial Examiner Scharnikow: I have been asked the question, Mr. Geltman.

Mr. Geltman: I am sorry.

Trial Examiner Scharnikow: Yes.

Mr. Silverman: I respectfully except.

Q. (By Mr. Silverman) Mr. Howe, the agreement in evidence as Respondent's Exhibit No. 2, in Article 1, Section 6, provides amongst other things that the "company agrees to take appropriate measures to assure that such members are in good standing."

Has the nature of the appropriate measures which companies have been required to take and have taken under the provisions of this agreement, been a matter of understanding and practice between the union and the company over a period of years?

Mr. Geltman: Objection.

Trial Examiner Scharnikow: I will sustain the objection.

Fred M. Howe—Direct.

Mr. Silverman: I respectfully except.

Q. (By Mr. Silverman) I further observe that in Article 1, Section 6, there is language to the effect that the union [353] agrees to grant all members of the union in good standing the necessary "clearance" for the position to which the radio officer has been assigned.

Has the word "clearance" which is contained in quotation marks in the agreement been the subject of understanding and practice between the union and the various companies with which it is under contract?

Mr. Geltman: Objection.

Trial Examiner Scharnikow: I will sustain the objection to the question as it is worded.

I suggest the possibility that you might inquire as to any disputes, actual disputes that have arisen as to the term "clearance" used in that section of the contract.

Q. (By Mr. Silverman) Had there, prior to this February incident of 1948, Mr. Howe, ever been any disputes between the union and any line and particularly the Bull Line with respect to the issuance of a clearance in situations where the issuance of such a clearance would involve the "bumping" or replacing of another man?

Mr. Geltman: Objection. The question does not relate to "clearance" at all. It relates to an interpretation of the contract in other respects; and, moreover, it also relates to controversies between other lines and the union and not the Bull Line.

Trial Examiner Scharnikow: I will overrule the objection. [354] You may answer the question.

The Witness: May I have it read, please?

Fred M. Howe—Direct.

Trial Examiner Scharnikow: Mr. Reporter, will you please read the question?

(Question read.)

The Witness: I do not recall any disputes regarding that.

I do not recall any company other than the Bull Line that engaged in "bumping".

I have been questioned about a clearance in reference to good standing, the good standing of a member. But no disputes.

* * * * *

[368] Q. (By Mr. Silverman) Mr. Howe, there are many members, are there not, who will depart from a ship, thereby establishing a certain shipping date, and who may not be interested in shipping out for a considerable period of time after that; is that not so? A. There are a great number that do that, who take lengthy vacations. Some never do return to the sea again.

Q. On the other hand, there are some who after a short absence from the sea will notify you of an interest in shipping out again? A. That is correct.

Q. Is that correct? A. That is correct.

Q. Will the union thereupon indicate to each and every member who inquires with respect to that the approximate length of time that is then elapsing between his shipping date and the time of availability of his next assignment? A. Not only do we tell them but we answer every letter that is written, any inquiry is responded to by us giving the [369] man the exact information and as good an estimate of the waiting time that we think will be required for him to get a job.

Q. Predicated upon the information which you so give the man, he is enabled to guide himself as to the date

Fred M. Howe—Direct.

when he can come up and get an assignment; is that so? A. Within a very few days.

Q. If the man for any reason of his own, despite knowledge of the fact he can get a job, prefers to do something else or remain on vacation, he is free to do that, isn't that so? A. That is correct. He may work at some shore job, if he wishes, and still retain his number on the list.

Q. As likewise indicates of a man who is desirous to ship out again, he comes to the Union Hall or otherwise signifies his desire for an assignment and is free then to bid upon any job that may be open when he appears at the Union Hall; is that so? A. Yes, sir.

Q. For example, when you wrote to Mr. Fowler in this letter of March 26, 1948, which is General Counsel's Exhibit 6, and you made the statement, as I quote:

"Your name will be sufficiently high on the list so that you can obtain a good assignment without waiting for more than a day or two, and this only so you may select the type of ship you desire."

[370] Is that information typical of information which the union is constantly furnishing its members? A. That is typical and it is truthful.

Q. And so upon receipt of information of that type, any member is free to signify his desire to obtain a ship by coming to the union and bidding on any particular type of ship that may be open? A. Yes.

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Q. Does it happen from time to time that a man will appear at the union hall apparently interested in a job and then absent himself from the hall because of possibly his having obtained another job or a different type of job or changed [371] his mind about shipping or anything of that sort? Does that happen? A. You mean another ship job or a shore job?

Q. Shore job possibly? A. Yes, they come in and ask

Fred M. Howe—Direct.

me how shipping is every day, and they may come back the next day and may come back in a week or may never come back.

Q. The reason they never come back is a reason entirely personal to the individual involved? A. Yes.

Q. Or a man may show up today at the union office and bid on a job and/or refrain from bidding on a job and then you may never see him again for some reason you know nothing about; is that so? A. That is correct, yes.

* * * * *

[372] A. It was given out in exactly the same manner before every member who was in the hall at the time.

* * * * *

[373] Q. (By Mr. Silverman) We have had full testimony concerning the telegram which was sent February 27, 1948? A. Yes.

Q. Was there any reason for sending that telegram other than the complaint made to you by Kozell with respect to his— A. No other reason at all.

Q. Was there anything you had against Fowler which was in any way connected with any union activity or lack of union activity on his part? A. Fowler and I had never had any disputes even of the minutest kind or disagreement over anything. And I had thought Mr. Fowler was a very fine gentleman; and I repeat again today I still think he is personally.

Q. Was there anything Fowler had done in connection with the Radio Officers' Union or any other union that would have caused you to take any action in the direction of treating him [374] any differently than any other member of the union? A. Positively not.

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[378] Trial Examiner Scharnikow: Well of course I think it is [379] clear that the term "clearance" as

Fred M. Howe—Cross.

used by the witnesses here and in the contract, Respondent's Exhibit 2, means merely that the union has assented to the hire of the particular union member.

* * * * *

FRED M. HOWE, Cross.

[392] Q. (By Mr. Geltman) With relation to the time when you gave Miller the job, that is a starting position already. A. The call came from either Captain Williams or Mr. Kiggins. Did not come from Mr. Frey. Mr. Frey was out of the picture.

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[417] Q. When you wrote to him in March sending back his dues card, you wrote, "I am sure you will enjoy and benefit by a change in companies"

* * * * *

What did you mean by that?

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[418] A. I stated yesterday when Mr. Fowler came in my office we had a rather lengthy conversation and discussed shipping and shipping on the Bull Line ships and the like of that, other ships. And I explained to Mr. Fowler that we did not have any Bull Line ships but that did not mean that Mr. Fowler would have to starve because there were no Bull Line ships, that he could ship on another ship or other ships, we had other very fine ships and he could take one of those ships anytime, practically, under the rules of our assignment rules. I explained to Mr. Fowler the advantages, how he himself would benefit personally by shipping on a variety of ships and a variety of companies, and going to different parts of the world, it would broaden his mind and broaden his experience and make him more efficient as a radio officer, and I told

Fred M. Howe—Re-direct.

many men the same thing. Mr. Fowler went away as I considered—

* * * * *

[419] A. He stated at the conclusion that he would ship out on some other ship and I had convinced him he should try some other line for his own benefit, that he need not necessarily confine himself to the Bull Line in the future.

* * * * *

[420] Q. (By Mr. Geltman) Mr. Fowler made it clear to you in April, did he not, in that conversation, that he was up from Miami solely for the purpose of getting a job on a Bull Line ship? [421] A. No. No, he did not make that clear to me at all.

* * * * *

FRED M. HOWE, Re-direct.

[426] Q. There are situations, I presume, that a man notifies you he is leaving the ship and the company may, for example, elect to tie it up so that you never do receive a call for that ship, is that so? A. That is correct.

* * * * *

Q. I show you a paper and ask whether this is the reply which you received to that letter.

Trial Examiner Scharnikow: Mark it, please.

The Witness: Yes.

Trial Examiner Scharnikow: Respondent's Exhibit No. 4.

(Whereupon, the document above referred to was marked Respondent's Exhibit No. 4 for identification.)

Mr. Silverman: I offer it in evidence.

The Witness: Could we substitute a photostat for that?

Fred M. Howe—Re-direct.

Mr. Silverman: Yes. I am going to ask leave to substitute a copy for that.

Mr. Geltman: No objection.

Trial Examiner Scharnikow: Respondent's Exhibit No. 4 is admitted in evidence, and permission is granted to substitute [427] a photostat.

(Whereupon, the document previously marked Respondent's Exhibit No. 4 for identification was received in evidence.)

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Q. (By Mr. Silverman) I believe the record is clear on this, but to make certain I would like to ask one more, if I may: Did Mr. Fowler ever show up at the office of the union after this telephone conversation that you had with him on April 26, 1948? A. No. I had never seen Mr. Fowler since that day until I saw him here a couple of days ago.

Q. Do you know, based upon Mr. Fowler's shipping date of January 2, 1948, whether he could have obtained an assignment aboard a vessel prior to April 26, 1948? Do you follow my question? A. Yes. He could obtain a job any time prior to that date.

Q. More specifically, when you wrote him your letter of March 25, 1948, which is General Counsel's Exhibit No. 6, [428] was it a fact that shipping conditions then were such that had Mr. Fowler elected to come up on let us say April 1 rather than April 26 that he could have obtained a ship within a day, within a matter of a day or two after April 1? A. That is correct, at that time, he could.

Q. And his remaining in Miami until April 26 was something over which you had no control, no right of interference; is that correct? A. That is correct.

Q. In short, there were available jobs he could have

Joseph P. Glynn—Direct.

come and had at any time; and the way in which he could signify or would signify his readiness for taking a job was by coming up and apprising the union of that readiness; is that right? A. We gave out close to 300 jobs between those dates.

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JOSEPH P. GLYNN, Direct.

[429] Q. During the latter part of February, 1948, did some information reach you that had a bearing on the Steamship Frances? A. I won't exactly say that.

However, I will tell you what happened.

Q. Go right ahead. A. Roughly on February 24 or possibly the 25th in the morning Mr. Alexander Kozell came to the office. He was looking for Mr. Howe, and I told him Mr. Howe was not there at the time and asked him if I could help him; and in substance he gave me the following story.

He said he was aboard the S. S. Frances, and that he had reason to believe that an attempt was going to be made to "bump" him from that ship. I don't know if he used the exact [430] word "bumped," but that is the substance of it.

I thereupon asked him if he could figure out any reason why the company should attempt to remove him; had he had any arguments with the master or any arguments with shoreside personnel of the company.

To that he stated no; the only thing he knew was that he was told—I don't know whether it was by Mr. Frey or by the Bull Line or by the agents or the master or by whom he was told; he stated a man was coming up from Miami to relieve him.

Q. What else occurred during that conversation? What did you tell Mr. Kozell, or how did the conversation ter-

Joseph P. Glynn—Direct.

minate? A. After he told me that, I said, "Do you want to stay aboard the ship?"

And he said, "Yes, I would very much like to stay aboard the ship."

I said, "In that case I would suggest you come back at a time when Mr. Howe is in the office."

Thereupon he asked me what time that would be, and I said normally Mr. Howe does not come in until the afternoon, 11, 12, 1 o'clock, no particular definite time.

Q. Did he return to the ship, do you know? A. You mean the same day or a later day?

Q. Yes. A. I cannot swear he returned that same day. But I did see [431] Mr. Kozell again during the month of February, 1948, whether the same day or the day after, I don't know.

Q. On that subsequent occasion did you have a discussion with him or did he have a discussion with Mr. Howe?

A. No. I may have nodded to him, recognizing the man, but as I recall, he spoke to Mr. Howe.

Q. Did you have any other connection with the incident that occurred in February with reference to the Frances?

A. As far as I know, that was my only contact or my only interest in the February incident.

I spoke to Mr. Kozell on that morning and referred him to Mr. Howe.

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JOSEPH P. GLYNN, Re-direct.

[447] Q. (By Mr. Silverman) I show you a batch of four clearance slips and ask you if you recognize these as being copies of clearances issued by the Radio Officers' Union on April 26, 1948? A. Yes, that is right.

Mr. Silverman: I offer them in evidence.

Mr. Geltman: May I see them?

[448] No objection.

Joseph P. Glynn—Re-direct.

Trial Examiner Scharnikow: Respondent's Exhibits 5, 6, 7 and 8 are admitted in evidence.

(Whereupon the documents previously marked Respondent's Exhibits Nos. 5, 6, 7 and 8 for identification were received in evidence.)

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Q. (By Mr. Silverman) Refreshing your recollection, Mr. Glynn, by reference to Respondent's Exhibit 7 which I now show you, can you tell me who it was that was cleared for the S. S. Raphael Semmes and on what date, after Mr. Fowler's indication that he did not want to take this assignment? A. Well, it states right on the assignment slip here that John I. Henry was assigned to the S. S. Raphael Semmes on April 26, 1948.

Q. Does that date appear on that particular assignment slip or does that appear in the batch of these clearances? A. That's right. They are stapled together and the date is on the top one. The assignment of the top one is immaterial. I should say it could show on any one of them on the top when they are stapled together.

Q. Does this batch of four clearances likewise contain the clearance which has been issued to Fowler on the morning of April 26 with the notation across it indicating it was "cancelled"? A. Yes, that is right.

Q. I observe Respondent's Exhibit No. 6 is a clearance [449] issued to Mr. Clinton E. Whitehurst for the S. S. Stony Point operated by Socony Vacuum Oil Company, which is signed likewise by you.

Did you make that assignment on that day?

A. That's right.

Q. I observe also on April 26 there is an assignment or clearance issued to Harold R. Tobias for the S. S. Fort Moultrie which appears to bear your signature, and I ask you whether you recall making that assignment on that day? A. Yes.

Colloquy.

Q. Now, at the time when Mr. Fowler bid on this job aboard the S. S. Raphael Semmes, was anything said directly or indirectly or was anything implied to the effect he was required or that he was under compulsion to bid for the opening aboard the S. S. Raphael Semmes? A. The Radio Officers' Union has never forced any member to accept any particular assignment. The man is free to reject any assignment he does not care to take.

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[450] Trial Examiner Scharnikow: From time to time in other connections evidence has come in which would also have a bearing on that question. Do I take it should the Board find a violation of the Act by the respondent union that the general counsel is pressing for a back-pay award?

Mr. Geltman: That is correct.

Mr. Silverman: It is?

Trial Examiner Scharnikow: As being appropriate under the facts?

Mr. Geltman: Yes, sir.

Trial Examiner Scharnikow: Would you dispute the fact that Mr. Fowler could have received assignments and jobs on vessels of steamship companies other than the Bull Steamship Company?

Mr. Geltman: It is our position that he at no time withdrew from the labor market; that he did not deliberately incur any loss; that the reason he did not get a job which he would have otherwise received was the wrong of the union here; and that the union here should remedy that wrong, put him back where he would have been.

Trial Examiner Scharnikow: Assuming the Board should [451] find a violation of the Act by the union here, in substance it would be the union's deprivation

Colloquy.

of Mr. Fowler of any job with the Bull Steamship Company, wouldn't it?

Mr. Geltman: That is right.

Trial Examiner Scharnikow: Not the deprivation of any job with any other steamship company?

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Trial Examiner Scharnikow: Let's narrow this question down. I may be breaking in a little out of turn here, but let me ask you this question:

Is the general counsel pressing for an award to indemnify Mr. Fowler for his loss of earnings from the date of the February incident on to the date of the April incident?

Mr. Geltman: Yes, sir, we are.

Trial Examiner Scharnikow: There is no dispute in connection with that period, is there, that Mr. Fowler could have, through the union, secured positions with other steamship companies other than the Bull Steamship Company?

Mr. Geltman: There is no dispute, no, that after he saw Mr. Howe and after the telegram was received and he came and saw Mr. Howe, he could have received a job through the union [452] with another steamship company. However, it is our position that in view of the circumstances, the man having come up from Miami to take a particular job, you have a complete reorientation at that point and a demand the man do something his whole trip was not geared to do.

Trial Examiner Scharnikow: You have an analogous situation in 8(a)(3) cases where a man is discharged by an employer discriminatorily, and it is true there, too, he is deprived of employment by that employer.

Mr. Geltman: But my view is this—

Colloquy.

Trial Examiner Scharnikow: Just to carry that through, the analogy that gives me some concern is that you now urge that in a roughly parallel case where union discrimination may be found in depriving an applicant for employment, employment by one company but not by other companies, that the possibility of the other jobs with the other companies might very well be considered as wiping out the award for back pay.

To follow through on something else you said, though: You do contend that so far as the April incident is concerned, there was not only a refusal to issue a clearance on a Bull Steamship job but a clearance on any job.

Mr. Geltman: Yes, sir. And I have thought, too, of the analogy in 8(a)(3) cases, and it boils down to this in my mind, if I may expound for a couple of minutes on this point.

Trial Examiner Scharnikow: Yes.

[453] Mr. Geltman: Take a man who goes to the plant of Mr. Jones to get a job, and Jones says, "I will not take you for discriminatory reasons," spelling them out, "not in this plant; you might, let us say, be of some value to my friend, Smith, next door. He does not care. In his plant he has always got bad influences. He will pay you the same as I would pay you, and if I call him up and tell him you are coming, he will take you. It is only a block away and the working conditions are the same." I say that is discrimination in original choice, and you cannot force discrimination in original choice although you know thereafter the man should not have himself removed from the labor market.

Trial Examiner Scharnikow: I raised the question because I would like to know how you gentlemen feel about whether we have an issue by reason

Colloquy.

of the seepage in of this type of testimony, as to whether the Board on the basis of the record made at this hearing at this stage is to consider whether any compensatory award should be made.

Do I have it in your opinion now or don't I? Do I have that question before me?

Mr. Geltman: You do have that question before you.

Trial Examiner Scharnikow: In spite of the usual rule that that sort of question is deferred to the compliance stage?

Mr. Geltman: I think that question is before you at [454] this time.

Trial Examiner Scharnikow: Do you so understand?

In other words, I am asking you in effect whether, notwithstanding the usual rule that this sort of question is deferred until we get to the question of compliance, if ever, whether you believe that because of the evidence which has been submitted in gradual stages, in view of that evidence I now have before me all the evidence which you think is pertinent on this normal compliance question? Will I have that—

Mr. Geltman: I think you do.

Trial Examiner Scharnikow: Or do you still submit that notwithstanding I have some evidence which is relevant on that question, the question itself should be deferred to the point when, as and if a Board order issues?

Mr. Geltman: It is my view that a back-pay order here is warranted similar to one—

Trial Examiner Scharnikow: I know that is your position.

Mr. Geltman: Yes.

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Robert H. Frey--Re-cross.

ROBERT H. FREY, Re-cross.

[462] Q. (By Mr. Silverman) Mr. Frey, when a member of the crew of a vessel signs off articles at the termination of a voyage, if that member is unsatisfactory to the master of the vessel and the master wants to discharge him, is that man placed on the port pay payroll? A. No.

Q. Mr. Kozell signed off his articles on February 20, 1948; is that right? A. According to the copy of the articles, that is correct.

Q. And he was kept on the port payroll until at least February 26, 1948; is that correct? A. That is what our records indicate.

Q. And that, as I understand it, is indication of the fact that Mr. Kozell had not been discharged by the master of the vessel and his services were satisfactory to the master of the vessel, is that correct? A. That is correct.

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ROBERT H. FREY, Re-direct.

[468] Q. Had you sent for Fowler directly or indirectly? A. No.

Q. In connection with the opening aboard the Evelyn? A. No.

* * * * *

[474] Q. In the course of this April incident, was anything done by the union to indicate that any action of any nature would be taken in the event that you assigned Fowler to the S. S. [475] Evelyn? A. No. There was no action taken.

Q. Was any threat of any action taken on April 26 or thereabouts? A. No, not to my knowledge, except that as I mentioned before—

Q. I am speaking of April now. A. That's right. That is what I am speaking of, too.

Argument on Behalf of General Counsel.

Except in the conversation with Mr. Howe, he said he would not assign him to the Evelyn or any Bull Line ship.

Q. Did you ever invoke or attempt to invoke the grievance procedure provided for in the agreement which is Respondent's Exhibit No. 2 in connection with any refusal or alleged refusal to issue a clearance to Mr. Fowler?

Mr. Geltman: Objection. This is very far removed from the direct examination.

Trial Examiner Scharnikow: I will sustain the objection.

Mr. Silverman: I respectfully except.

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COLLOQUY.

ARGUMENT ON BEHALF OF GENERAL COUNSEL.

[486] Trial Examiner Scharnikow: You are not making any argument, then, that this "bumping" which Mr. Howe testified he suspected of Mr. Fowler's having done would not have been the proper ground for a suspension of Mr. Fowler from union membership if the proper mechanics had been followed?

Mr. Geltman: No. I am making no such contention. I am saying the mechanics were not followed as between him and his union.

Trial Examiner Scharnikow: You would concede—of course this is academic, but just to understand your position thoroughly—if the mechanics had been followed here—

Mr. Geltman: Had he been suspended properly, I do concede now that he would not be entitled to that protection; [487] they would be within their rights in withholding a clearance from the man.

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Argument on Behalf of the Respondent Union.

ARGUMENT ON BEHALF OF THE RESPONDENT UNION

[491] Mr. Silverman: * * * Just separating that for a moment, it appears perfectly clear to me that the latter portion of Section 8(b)(2) is not applicable.

Trial Examiner Scharnikow: There is no question about that, is there?

Mr. Geltman: No.

* * * * *

Trial Examiner Scharnikow: What about Mr. Geltman's argument that there was not an effective removal of Fowler from membership in good standing because Howe did not secure the assent of the general committee nor did he first give Fowler a warning as is apparently required by the by-laws? What is your position on that?

* * * * *

Mr. Silverman: Mr. Trial Examiner, the provisions of the constitution fairly read—in the first place, there is a provision that has not been called to your attention to the effect the general chairman shall interpret the by-laws of the Radio Officers' Union and the Commercial Telegraphers Union constitution on behalf of the Radio Officers' Union, with final decision resting with the International President of the Commercial Telegraphers Union. That is Article 7, Section 6, I believe it is. And in the absence of the general chairman of course the general secretary-treasurer is empowered to act [498] as the general chairman.

Now I certainly say that Article 7, Section 3 and Article 17, Section 1 can certainly be reasonably interpreted as empowering the general chairman or, in his absence, the general secretary, to take action such as was taken in this case. You are frequently confronted with situations where the members of the general committee are at sea at the time a particular problem arises; they are out sail-

Argument on Behalf of the Respondent Union.

ing ships, and to have permitted this matter to have rested until the general committee could be consulted first, would, in effect, permit the action—certain conduct to take place which it would be impossible to remedy thereafter.

• • • • •

There are other provisions in the constitution and by-laws that generally carry with it and connote and clearly imply the same sense and the same reasoning. Thus, for example, there is a provision in Article 9, Section 12—and I am not [499] making my reference to these provisions all-inclusive, I am merely pointing up a few of them at this time—referring to Article 9, Section 12, there is a provision that when the general committee, due to various circumstances there outlined, such as illness, absence from the country or other reasons is unable to fulfill its responsibilities and duties as provided in Article 9, various sections, such responsibility and duties devolve upon the general chairman and the general secretary-treasurer.

• • • • •

General Counsel's Exhibit 8.

Pier 8 S. I.

THE RADIO OFFICERS' UNION
1440 Broadway
New York, N. Y.

To: Willard C. Fowler

(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.
Raphael Semmes

Operated by Waterman Steamship Co.
19 Rector Street, N. Y. C.

(Office or pier at which to report)

Assigned by Joseph P. Glynn

In accepting this assignment I hereby agree to notify
The Radio Officers' Union by telephone or telegraph before
quitting my ship in any United States port. I agree to do
my utmost to see that none but a member of my union in
good standing relieves me when I leave my ship.

W. C. FOWLER

(Name of Radio Officer)

General Counsel's Exhibit 10.

OFFICIAL CLEARANCE

issued by

THE RADIO OFFICERS' UNION
1440 Broadway, New York, N. Y.
Phones: LACKAWANNA 4-5022 — 4-5093

To Henry S. Miller

(Name of Radio Officer)

You are hereby assigned as only Radio Officer
S.S. Frances

General Counsel's Exhibit 11.

Before going to the ship or to the steamship company's office, report to:

[If Mr. Frey is not in office,
contact Mr. Harold Kussmaul,
Assistant to Captain Respes]

Report immediately, or at New York 9:30 AM
(Time or date)

To A. H. Bull & Co.

(Name of Steamship Company)

115 Broad Street, New York

(Address of Steamship Company)

Attention Mr. Frey

This is a Permanent assignment

(Temporary or permanent)

Date issued March 1, 1948

Time issued 3:35 PM

FRED M. HOWE

Dispatcher

General Counsel's Exhibit 11.

OFFICIAL CLEARANCE

issued by

THE RADIO OFFICERS' UNION

1440 Broadway, New York, N. Y.

Phones: LACKAWANNA 4-5022 — 4-5093

To Frank Paese

(Name of Radio Officer)

You are hereby assigned as only Radio Officer
S.S. Evelyn

General Counsel's Exhibit 11.

Before going to the ship or to the steamship company's office, report to:

Take IRT downtown local to
South Ferry, then walk along South
Street until you come to Broad
Street, turn to left and walk to
No. 115 BROAD STREET

Report immediately, or at 10:30 A. M.

(Time or date)

To A. H. Bull & Co.

(Name of Steamship Company)

115 Broad Street, New York

(Address of Steamship Company)

Attention Captain Respass or Mr. Kaussmaul

This is a Permanent assignment

(Temporary or permanent)

Date issued April 27, 1948

Time issued 10:30 AM

Dispatcher

FRED M. HOWE

General Counsel's Exhibit 12

(L e t t e r)

THE RADIO OFFICERS' UNION
C. T. U.—A.F. of L.

June 22, 1948.

Mr. Charles T. Douds, Regional Director,
National Labor Relations Board,
2 Park Avenue,
New York, 16, N. Y.

RE: Case No. 2-CB-91
A. H. Bull Steamship Company
Willard Christian Fowler

Dear Sir:

This will acknowledge receipt of your letter dated June 18, 1948 and copy of Charge in the above-entitled case. Our reply to the Charge follows:

On or about December 29, 1947, Alexander Kozel, member of The Radio Officers' Union, was assigned as Radio Officer to the S. S. FRANCES, operated by A. H. Bull Steamship Company. The assignment was made at New Orleans, La. by Kenneth J. Wright, our New Orleans Representative. The assignment was made as a permanent one, and Mr. Kozel accepted the position as a permanent one.

Upon arrival of the vessel in New York on or about February 27, 1948, Mr. Kozel was informed by Robert H. Frey, Radio Supervisor of the A. H. Bull Steamship Company, that he (Mr. Kozel) might be obliged to relinquish his job due to the Company's anticipating the arrival of another Radio Officer from Miami, Florida.

Mr. Kozel came to my office and protested being discharged to make way for another man. Mr. Kozel informed me that the Captain of the vessel had expressed a desire that Mr. Kozel continue aboard the ship as Radio Officer.

General Counsel's Exhibit 12.

Neither the Captain of the vessel nor the Company made an protest to the Union, either written or verbal, that Mr. Kozel was unsatisfactory, either at the time of the incident, prior thereto, or afterwards. We felt that as long as Mr. Kozel's work was satisfactory and as he had been hired as a permanent employee, he should not be discharged. Our agreement with the Company makes no provision for the discharge of a Radio Officer, except for cause. We, thereupon, registered our protest with the Company against Mr. Kozel's discharge.

At that time, Mr. Fowler had not applied to the Union for a clearance to take the job in question in accordance with the usual practice and in accordance with provisions of our agreement with the Company. When it was brought to the attention of the Union that Mr. Fowler had gone aboard S. S. FRANCES, an appropriate telegram was sent to him. Mr. Fowler, thereupon, called at the Union office and apologized for having gone aboard without a clearance and stated to me that he had had no knowledge that by taking the position he would be displacing another member of the Union. He also stated to me at the time that had he known that he was to displace another men, he would not have come to New York.

During his visit to this office, I informed Mr. Fowler that he could very quickly obtain another ship through the Union's hiring facilities. However, Mr. Fowler said that he had some work to do in Miami and would return home for a period. He also stated that he would return to New York at a later date and ship out through the Union. To this, we agreed.

On or about April 26, 1948, Mr. Fowler returned to New York, called at the Union office, applied for an assignment, and was assigned as Radio Officer to S. S. RAPHALE SEMMES, operated by Waterman Steamship Corporation. This is a very fine type of ship, equal in all respects to any mer-

General Counsel's Exhibit 12.

chant vessel now in operation. The wage scale, overtime, and working conditions on this vessel were, and still are, identical to those on vessels operated by A. H. Bull Steamship Company.

Although the Waterman Steamship Corporation agreed to hire Mr. Fowler, he (Mr. Fowler), declined to accept the job. He called me on the telephone and said he had decided not to accept for the reason that he had gone on board the vessel and talked to some of the crew members, or Officers, and concluded that he "wouldn't like the ship or the set-up."

I have no record that Mr. Fowler came to this office on or about April 26, 1948 for a "clearance" for any vessel operated by A. H. Bull Steamship Company; neither do I have any recollection that any official of the A. H. Bull Steamship Company called at this office in person, telephoned, or wrote to the Union requesting that Mr. Fowler be "cleared" for any of the Company's vessels.

Mr. Fowler has been a member of the Union since November 9, 1942 and his dues are paid up and he is in good standing.

If you require further information from us concerning this matter, I shall be pleased to cooperate with your office to the best of my ability.

Very respectfully yours,

FRED M. HOWE,
General Secretary-treasurer.

General Counsel's Exhibit 14

* * * * *

ARTICLE 6—OFFICERS

- Sec. 1 The administrative officers of the ROU shall be a General Chairman, a General Committee composed of two members for every port or district where the Union maintains an office, and a General Secretary-treasurer.

* * * * *

ARTICLE 7—GENERAL CHAIRMAN

- Sec. 1 The General Chairman, as titular head of the ROU shall see that the Constitution of the CTU, the By-laws, contracts and agreements of the ROU are strictly enforced and adhered to and shall call to account any officer or member violating these laws, contracts or agreements.

* * * * *

- Sec. 6 The General Chairman shall interpret the by-laws of the ROU, and the CTU Constitution on behalf of the ROU, with final decision resting with the International President of the CTU.

* * * * *

- Sec. 8 The General Chairman shall perform such other duties as are otherwise provided for in these by-laws and the CTU Constitution.

* * * * *

ARTICLE 8—GENERAL SECRETARY-TREASURER

- Sec. 9 The General Secretary-Treasurer shall act in the capacity of General Chairman in all absences of the General Chairman.

* * * * *

General Counsel's Exhibit 14.

ARTICLE 9—GENERAL COMMITTEE

Sec. 1 The General Committee of the ROU shall be composed of two members for every port or district where the Union maintains an office. Six members of the General Committee shall constitute a quorum at any meeting.

Sec. 2 The General Committee shall provide a guardianship over the properties affairs and activities of the ROU and shall ensure that the principles and policies upon which the ROU was founded are continued and extended so as to redound to the benefit and best interest of the membership of the ROU.

* * * * *

Sec. 6 The General Committee shall undertake to settle all grievances appealed to it or placed before it by any member or officer of the ROU after a proper officer of the ROU is unable to settle such grievance, before further appeal is taken by the member or officer under Article 28 of the CTU Constitution.

* * * * *

Sec. 12 When the General Committee, due to the exigencies of war, illness, absence from the country, or for other reasons, is unable to fulfill its responsibilities and duties as provided for in Article 9, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, such responsibilities and duties shall devolve upon the General Chairman and the General Secretary-treasurer, and shall be carried out by them in accordance with the Constitution and By-laws until such time as the General Committee is capable of functioning.

* * * * *

Respondent's Exhibit 2.

ARTICLE 19—ASSIGNMENTS

* * * * *

Sec. 3 In each locality where the ROU maintains an office or Representative, assignment rules for that locality may be laid down by membership meetings in that locality but such rules to become effective, must be approved by the General Committee and a second membership meeting in that locality.

* * * * *

Respondent's Exhibit 2

ARTICLE I—EMPLOYMENT

* * * * *

SECTION 2. When a member of the Union in good standing qualified to fill the vacancy cannot join the vessel in ample time to prevent a delay in her scheduled departure, then members of the Union in good standing shall be deemed unavailable, in which event employment for such position will be without regard to Union affiliation for that voyage only.

* * * * *

SECTION 5. Radio Officers may be transferred from one vessel to another and nothing contained in this Agreement shall be construed as requiring the discharge of any presently employed Radio Officer who, in the opinion of the Company, is satisfactory, or to prevent the discharge of any Radio Officer who, in the opinion of the Company, is not satisfactory, provided, however, that if the Union feels that any discharge is discriminatory, it shall be dealt with as a grievance and provided further, that such discharge shall not interfere with or delay the dispatch of any vessel on her scheduled departure from any port.

* * * * *

Respondent's Exhibit 2.

ARTICLE V—GRIEVANCES

* * * * *

In the event the Radio Officers and Master or Company representative cannot settle any grievance arising under the terms of this Agreement or any alleged violation of any part of this Agreement or the interpretation of any clause of this Agreement, it shall be dealt with between authorized representatives of the Union and representatives of the Company. Before any matter is referred to arbitration as provided for in Article VI hereof, a national officer of the Union and an executive of the Company, or his duly authorized representative, shall attempt to satisfactorily resolve the issue or issues.

ARTICLE VI—ARBITRATION

SECTION 1. Matters which are not satisfactorily settled as provided for in Article V hereof shall by written notice be referred to a board of arbitration which shall meet in the Port of New York or such other place as may be mutually agreed upon, and shall be composed of one representative appointed by the Company and one representative appointed by the Union. All appointments shall be made within forty-eight (48) hours, Sundays and holidays excluded, after receipt of written notice to arbitrate. In the event the board of two fails to reach a decision within three (3) working days after it goes into deliberation, then the board of two shall select a third member to act as chairman. If the board of two cannot agree upon a chairman then the Director of Conciliation, U. S. Department of Labor, shall designate an impartial chairman who shall be a "per diem" man. The decision of the board of two or the decision of a majority of the board of three shall be the decision of the board and shall be final and binding upon the Company, the Union, and the Radio Officers.

* * * * *

Respondent's Exhibit 2.

ARTICLE XXII

* * * * *
 SECTION 2. * * * The Union agrees that it will not uphold incompetency or improper conduct on the part of members serving on vessels operated by the Company.

MAIN OFFICE:
 1440 BROADWAY
 NEW YORK 18, N. Y.
 LACKAWANNA 4-5022—5093
 FRED M. HOWE, Gen. Secy.-Treas.

R. O. U. OFFICES

Baltimore, Md.
 14 East Lexington Street
 ANDREW MACDONALD, Gen. Ch.
 Phone Plaza 6319

San Francisco, Calif.
 105 Market Street
 RALPH D. FINCH, Rep.
 Phone Sutter 4320

Boston, Mass.
 170 Summer Street
 STEPHEN E. DOUGLASS, Rep.
 Phone HUBbard 9566

Wilmington, Calif.
 108 East "C" Street
 ROBT. H. WILSON, Rep.
 Phone TER. 4-4812

AIRWAYS OFFICE
 37-46—82nd Street
 Jackson Heights L. I., N. Y.
 Phone HA 6-6847

New Orleans, La.
 Room 408 Baronne Bldg.
 KENNETH J. WRIGHT, Rep.
 Phone RAYmond 3692

Respondent's Exhibit 5.

April 26, 1948

(Cancelled)

THE RADIO OFFICERS' UNION
1440 Broadway
New York, N. Y.

To: Willard C. Fowler

(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.
Raphael Semmes

Operated by Waterman Steamship Co.
19 Rector Street, N. Y. C.

(Office or pier at which to report)

Assigned by Joseph P. Glynn

In accepting this assignment I hereby agree to notify
The Radio Officers' Union by telephone or telegraph before
quitting my ship in any United States port. I agree to do
my utmost to see that none but a member of my union in
good standing relieves me when I leave my ship.

W. C. FOWLER

(Name of Radio Officer)

Respondent's Exhibit 6.

THE RADIO OFFICERS' UNION
1440 Broadway
New York, N. Y.

To Clinton R. Whitehurst

(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.
Stony Point

Respondent's Exhibit 7.

Operated by Socony Vacuum Oil Co.

26 Broadway, N. Y. C.

(Office or pier at which to report)

Assigned by Joseph P. Glynn

In accepting this assignment I hereby agree to notify The Radio Officers' Union by telephone or telegraph before quitting my ship in any United States port. I agree to do my utmost to see that none but a member of my union in good standing relieves me when I leave my ship.

C. R. WHITEHURST

(Name of Radio Officer)

Respondent's Exhibit 7.

THE RADIO OFFICERS' UNION

1440 Broadway

New York, N. Y.

To John I. Henry

(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.

Raphael Semmes

Operated by Waterman Steamship Corp.

19 Rector Street, New York

(Office or pier at which to report)

Assigned by Fred M. Howe

In accepting this assignment I hereby agree to notify The Radio Officers' Union by telephone or telegraph before quitting my ship in any United States port. I agree to do

Respondent's Exhibit 8.

my utmost to see that none but a member of my union in good standing relieves me when I leave my ship.

JOHN I. HENRY
(Name of Radio Officer)

Respondent's Exhibit 8.

THE RADIO OFFICERS' UNION
1440 Broadway
New York, N. Y.

To Harold R. Tobias
(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.
Fort Maultrie

Operated by Mathiesen's Tanker Industries

Todd's Erie Basin, Brooklyn

(Office or pier at which to report)

Assigned by Joseph P. Glynn

In accepting this assignment I hereby agree to notify The Radio Officers' Union by telephone or telegraph before quitting my ship in any United States port. I agree to do my utmost to see that none but a member of my union in good standing relieves me when I leave my ship.

HAROLD R. TOBIAS
(Name of Radio Officer)

BLEED THROUGH- POOR COPY

[fol. 78] UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT, OCTOBER TERM, 1951

No. 158

Argued February 7, 1952 Decided May 6, 1952

Docket No. 22191

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRA-
PHERS UNION, AFL, Respondent

Before: Swan, Chief Judge, L. Hand and Clark, Circuit
Judges

Petition of National Labor Relations Board for enforce-
ment of its order of April 18, 1951, directing the respondent
union to cease and desist from certain unfair labor practices
and to take certain affirmative action. Petition granted.

George J. Bott, General Counsel, David P. Findling, Asso-
ciate General Counsel, A. Norman Somers, Assistant Gen-
eral Counsel, and Owsley Vose and Willis S. Ryza, At-
torneys, National Labor Relations Board, for Petitioner.

[fol. 79] Butler & Silverman, Attorneys for Respondent;
Abner H. Silverman, Emanuel Butler and Alexander C.
Russotto, of Counsel.

SWAN, Chief Judge:

This is a petition by the National Labor Relations Board
for enforcement of its order issued April 18, 1951 against
the respondent union, 93 N. L. R. B. No. 249. The order
found that the union had engaged in certain unfair labor
practices in violation of sections 8(b)(1)(A) and 8(b)(2)
of the National Labor Relations Act as amended, by causing
the A. H. Bull Steamship Company to discriminate against
William Christian Fowler, a ship's radio operator and a
member of the union, thereby causing Fowler to lose employ-
ment by the company on each of two occasions, namely,
February 28, 1948 and April 26, 1948. It ordered the union
to cease and desist from such unfair labor practices, and

affirmatively, to give notice that it withdraws objection to Fowler's employment by the company and to make Fowler whole for any loss he may have suffered by reason of the union's preventing his employment on the above mentioned two occasions.

The questions presented for decision are (1) whether the record supports the finding that the union refused Fowler "clearance" to work on the Bull Company's ships; (2) whether such refusal was permitted by the terms of the contract between the Bull Company and the union; (3) whether the union's purported suspension of Fowler's union membership in February 1948 was valid; and (4) whether the facts as found establish a violation of sections 8(b)(1) (A) and 8(b)(2).

The Board accepted the facts as found by the trial examiner. We also accept them. In so far as there was any [fol. 80] dispute as to the facts, the findings depend upon the credibility of witnesses, whom the trial examiner heard and saw. As we recently said in *N. L. R. B. v. Chautauqua Hardware Corp.*, 192 F. 2d 492, 494, "When an issue turns upon the credibility of witnesses, the Examiner's findings are especially entitled to be respected," citing *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 496. The record contains nothing which would justify holding the findings to be clearly erroneous; hence they are supported by "substantial evidence," as the statute requires. 29 U. S. C. A. § 160(e).

Briefly, the facts found by the examiner were as follows: Fowler, a ship's radio operator, joined the respondent union on July 1, 1942 and was a member in good standing in February and April, 1948. On February 24, Fowler received at his home in Miami, Florida, a telegram from the Bull Company, on whose ships he had previously worked, requesting him to "Proceed New York as soon as possible for position SS. Frances." Kozel, also a member of the union, had served as radio officer on the last voyage of the Frances and was discharged by Mr. Frey, the company's radio supervisor, on the termination of that voyage at New York. After Fowler arrived in New York in February 1948, the union refused to give him "clearance," i.e. a written statement of "good standing" in the union. This was because Mr. Howe, the general secretary of the union, be-

lieved that Fowler had pushed Kozel out of his job, although in fact Fowler had had nothing to do with Kozel's discharge. For lack of a "clearance" Fowler was not given employment on the Frances, and returned to his home in Florida. This was the February transaction.

On April 22, 1948 Fowler again came to New York and the next day informed Frey that he was available. He also talked with Howe who was willing to give him a job with [fol. 81] other shipping lines but not with the Bull Company. Howe told Fowler: "You will be given no clearance for any Bull Line ship. Frey has been talking too much to you down there and making a company stiff out of you. I am going to break it up right here and now." Frey testified that on April 26 he asked Howe for a clearance for Fowler on the S.S. Evelyn which was refused. Another union member was given the job. This was the April transaction.

At the time of the transactions above described a collective bargaining agreement was in effect between the union and the company.¹ The respondent contends that the agreement provided for a "hiring hall," the petitioner that it did not. If it was a hiring hall contract the union could select from among its members the one to be hired by the company; if it was not a hiring hall contract the privilege of initial selection was the company's, subject only to the employee being a union member "in good standing." The Board determined that the contract did not provide for a hiring hall. The correctness of this decision is the principal question before us. A majority of the court thinks it correct.

The pertinent provisions of the contract are printed in the margin.² By Section 1 the company agrees, when va-

¹ The agreement was signed on January 11, 1947 and was extended on August 16, 1947 for a period of one year. Consequently under section 102 of the Taft-Hartley Act, 61 Stat. 152, section 8(3) of the Wagner Act, 29 U. S. C. A. § 158(3), was applicable to it.

²

"Article I—Employment

Section 1. The Company agrees when vacancies occur necessitating the employment of Radio Officers, to select such Radio Officers who are members of the Union in good standing, when available, on vessels covered by this Agree-

[fol. 82] cancies occur, "to select * * * members of the Union in good standing, when available, * * * provided such members are in the opinion of the Company qualified to fill such vacancies." Section 3 provides that if no qualified member of the union is available, the company will, "before a non-member of the Union is hired" give the union an opportunity to furnish a radio officer with the license necessary for the position to be filled. Section 6 provides that

ment, provided such members are in the opinion of the Company qualified to fill such vacancies.

* * * * *

Section 3. When a member of the Union in good standing qualified to fill the vacancy is not available, the Company will notify the Union twenty-four (24) hours in advance before a non-member of the union is hired, and give the Union an opportunity to furnish without causing a delay in the scheduled departure of the vessel a competent and reliable Radio Officer with the license necessary for the position to be filled.

* * * * *

Section 5. Radio Officers may be transferred from one vessel to another and nothing contained in this Agreement shall be construed as requiring the discharge of any presently employed Radio Officer who, in the opinion of the Company, is satisfactory, or to prevent the discharge of any Radio Officer who, in the opinion of the Company, is not satisfactory, provided, however, that if the Union feels that any discharge is discriminatory, it shall be dealt with as a grievance and provided further, that such discharge shall not interfere with or delay the dispatch of any vessel on her scheduled departure from any port.

Section 6. The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary 'clearance' for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing."

the company "shall have the right of free selection" of its radio officers, and when a member of the union is "hired," the company must "take appropriate measures," to make sure that such member is "in good standing." If he is in good standing, the union agrees to give "the necessary clearance" for the position to which the radio officer "has been assigned"; and, if he is not, the union must so notify the company in writing. These provisions plainly give the company the right to select the man it desires to hire, and [fol. 83] require the union to grant "clearance" if the man the company wants is a member in good standing. Such procedure is not a "hiring hall" arrangement. Even if we regarded the contract as ambiguous, which we do not, the doubt must be resolved against the union. Hiring hall arrangements, like closed shop arrangements, are an exception to the general provisions in section 29 U. S. C. A. § 158(a) against employer discrimination, and "one seeking to come within the exception must clearly comply with its terms." *N. L. R. B. v. Don Juan, Inc.*, 2 Cir., 178 F. 2d 625, 627.

The union contends that, regardless of the terms of the contract, the uniform practice of the parties so modified them as to make the contract one for a hiring hall. The trial examiner found:

"Although the contract contained no reference to a hiring-hall arrangement, the companies generally requested the Respondent to furnish radio officers to fill vacancies. To meet these requests, the Respondent maintained a 'shipping list' of its unemployed members in the order of the termination of their last employment. When a request for a radio officer was received from a company, the Respondent offered the assignment and requisite clearance to those of its unemployed members who were waiting for assignments in the Respondent's office, in the order in which their names appeared on the 'shipping list' * * * While this appears to have been the general practice, Fred Howe, the Respondent's secretary-treasurer, testified that on some few occasions, companies have asked that particular radio officers be assigned to them. In some of these instances, the Respondent refused the requests; in other instances,

the Respondent honored the requests although, as Howe [fol. 84] put it, 'Some of the members don't think too much of that system.' "

Complaint is made that the union was restricted in its proof as to the practice of the parties under contract. But we can find in the record no exclusion of proffered evidence which would have added anything material to that which was summarized in the above quoted finding. We agree with the Board that such practice did not effect a surrender of the company's rights under the contract. In most instances the company may have found it more convenient to ask the union to send a man than to find one for itself, but a party to a contract does not lose clearly reserved rights merely by non-insistence upon them in every instance.³

The union contends that in any event the refusal to grant a clearance to Fowler in February cannot be made the basis of an unfair labor practice charge because Fowler was not then in good standing—an adequate reason under the contract for refusing clearance. Howe, the general secretary of the union, ruled that Fowler was not in good standing since he had "bumped" a fellow union man. The trial examiner and Board found that Howe had no authority to make such a ruling, and we agree. A member of the respondent could be suspended in two ways: by the General Chairman with the consent of the General Committee or by the General Chairman alone, after first warning the member to correct his dereliction. Even if Howe was acting as General Chairman under Article 7, §7 of the by-laws, [fol. 85] he neither obtained the consent of the General Committee nor gave warning to Fowler before suspending him, and therefore the attempted suspension was invalid. Nor are we persuaded by the respondent's argument that neither the Board nor this court can review a union officer's

³ *Walter Kidde & Co. v. Walton-Viking Co.*, 8 Cir., 153 F. 2d 988, 991-992, cert. den., 329 U. S. 715; *South Atlantic S. S. Co. v. N. L. R. B.*, 5 Cir., 116 F. 2d 480, 482, cert. den. 313 U. S. 582; *Dant & Russell, Inc. v. Grays Harbor Exportation Co.*, 9 Cir., 106 F. 2d 911, 912; *In re Chicago & E. I. Ry. Co.*, 7 Cir., 94 F. 2d 296, 299.

interpretation of his own powers. Such a holding would permit rights guaranteed by the Act to be brushed aside by the artful drafting and interpretation of union constitutions and by-laws. Where those rights are concerned, there is as much reason to review the grounds for the suspension of a union member as to review an employer's asserted reasons for discharging an employee.

We think it clear that the union violated section 8(b)(1) (A) of the Act, 29 U. S. C. A. §158(b)(1)(A), by "coercing" Fowler "in the exercise of the rights guaranteed in section 7." Among those rights is the freedom to refrain from taking part in the "concerted activities" of a union. The concerted activity in the case at bar was refusal to take employment with the company as a means of reprisal against it for discharging Kozel. Fowler's privilege of refraining from concerted activities was limited only to the extent of requiring membership in a labor organization as a condition of employment. The attempt to suspend him from union membership and the refusal of a clearance were economic coercion in its most effective form. *Cf. N. L. R. B. v. Newman*, 2 Cir., 187 F. 2d 488, enforcing 85 NLRB 725, 730. The union's closed shop contract did not protect it because Fowler was in good standing as a member of the union. Before the union could deprive him of this status, it was obliged to adopt the disciplinary procedure provided in its constitution and by-laws. Consequently he was free to refrain from taking part in the union's concerted activity. *Cf. Union Starch & Refining Co. v. N. L. R. B.*, 7 Cir., 186 F. 2d 1008, 1011, cert. den. 342 [fol. 86] U. S. 815; *Colonie Fibre Co. v. N. L. R. B.*, 2 Cir., 163 F. 2d 65, 68-70.

The refusal to grant Fowler clearance although he complied with the only condition of employment—union membership in good standing—was also a violation of section 8(b)(2) of the Act, 29 U. S. C. A. §158(b)(2), by inducing a violation of section 8(a)(3), 29 U. S. C. A. §158(a)(3). Refusal of clearance caused the company to discriminate against Fowler in regard to hire. Without the necessary clearance it could not accept him as an employee. The result was to encourage membership in the union. No threats or promises to the company were necessary. See *International Brotherhood of Electrical Workers v. N. L. R. B.*,

2 Cir., 181 F. 2d 34, 38, aff'd 341 U. S. 694. Whether the union's motive was, as it argues, to enforce the contract provisions against discharging satisfactory radio officers such as Kozel, is immaterial, although its failure to invoke the grievance procedure of Article I, section 5 of the contract and its precipitate and invalid suspension of Fowler seem hardly consistent with such motive. And in the April transaction it refused to allow the company to employ him on any of its ships. Such conduct displayed to all non-members the union's power and the strong measure it was prepared to take to protect union members. Cf. *Colonie Fibre Co. v. N. L. R. B.*, 2 Cir., 163 F. 2d 65, 68, 69.

The union assigns a number of other errors which we find unsubstantial. The amendment of the complaint to include the February incident was properly granted and respondent obtained a recess to prepare his case. Respondent also argues that Fowler could not seek the Board's aid without first utilizing the grievance and review procedure in the contract and the union constitution and by-laws. But the Board here is asserting a public right, not Fowler's personal right, and the Board's power is not dependent on the availability of other means of adjustment. See §10(a) of the Act; *National Labor Relations Board v. Newark Morning Ledger Co.*, 3 Cir., 120 F. 2d 262, 268, cert. den. 314 U. S. 693. Nor was there error in failing to join the company as a respondent in this proceeding. A finding that the union has violated §8(b)(2) can be made without joining the employer and finding a §8(a)(3) violation. See *National Labor Relations Board v. Newspaper & Mail Deliverers' Union*, 2 Cir., 192 F. 2d 654, 656; *National Union of Marine Cooks and Stewards, C. I. O. (George C. Quinley)*, 92 NLRB 877. Nor do we find the Board's back pay provision improper. The way is still open to determine, in the compliance proceedings the effect of Fowler's refusal to work on other ships.

The petition for enforcement is granted.

CLARK, Circuit Judge (dissenting):

I dissent from the grant of enforcement on the grounds persuasively stated by Board Member Murdock in dissenting below, 93 N. L. R. B. No. 249. (Board Member Reynolds also dissented as to the Board's ruling on the February incident, limiting "his finding of discrimination to the Respondent's failure to clear Fowler in April when his good standing had been restored.") Mr. Murdock first says:

"The majority of my colleagues and the Trial Examiner found the facts in this case, briefly stated, to be as follows. On February 27, 1948, complainant Fowler was offered a position as radio officer by the Bull Steamship line on its ship, the *S. S. Frances*. Fowler was, at this time, a member in good standing of the Respondent. In order that a vacancy in the position of radio officer on the *Frances* might exist, however, it was necessary for the company to dis-[fol. 88] charge another member of the Respondent who was currently employed in that job.¹ Upon complaint of the displaced member, Howe, the secretary-treasurer of the Respondent thereupon suspended Fowler for 'bumping' another member and a subsequent request by the Company for clearance of Fowler for the position was denied by the Respondent. The suspension of Fowler was later lifted, but, when on April 26, the Company again offered Fowler employment as a radio officer on its vessel, the *S. S. Evelyn*, clearance was once more refused by Respondent. As a

¹ So I think the opinion is in clear error in first indicating that Kozel was discharged for some unspecified reason and then stating, "although in fact Fowler had nothing to do with Kozel's discharge," as a rebuttal of the union secretary's belief "that Fowler had pushed Kozel out of his job." There are no such findings in the record, and the Trial Examiner's recital of those findings which were made "upon uncontradicted evidence" is to the contrary. Thus at the end of the "*Frances*'" voyage in February, Frey, the company's radio supervisor, "told Kozel that although his services had been satisfactory, he was to be replaced by 'a man with senior service in the company.'" So elsewhere the Examiner speaks of "Kozel, a member of the Respondent, whom Fowler was to replace."

consequence of the refusal to grant the clearances, the positions, in both instances were filled by other members of the Respondent. Admittedly, in both instances, negotiations for employment of Fowler were carried on by the latter and the Company without reference to the Respondent other than the requests for clearance. The Respondent therefore contends that its actions were in accord with, and protected by, the terms of its contract with the Company and the 'hiring hall' operated in conjunction with that agreement. I find the Respondent's argument persuasive."

He then continues (omitting some footnote references and explanations):

"There seems no question that, if the contract between the Respondent and the Company during the period con-[fol. 89]cerned herein provided for employment of radio officers only through a union hiring hall, the denial of the clearances by the Respondent was both justified and protected under the terms of the amended Act. My disagreement with my colleagues, accordingly, centers upon the question of the existence of a hiring hall provision in that agreement. The record is clear, and indeed the Trial Examiner finds, that the various steamship companies, including the Bull line, who were parties to the contract, 'generally requested the Respondent to furnish radio officers to fill vacancies.' Further, 'to meet these requests, the Respondent maintained a "shipping list" of its unemployed members in the order of the termination of their last employment' and when a vacancy occurred, it was filled by offering the assignment and the requisite clearance to members of the Respondent on the shipping list in the order occurring there. Despite this clear showing of the existence and operation of a hiring hall, however, the Trial Examiner and the majority opinion contend such an arrangement is without provision in the contract between the parties and is thus unavailable to the Respondent as a defense. This conclusion, in direct contradiction of the established facts, is reached in view of a purported lack of a clear hiring hall provision in the agreement, the reservation of the right of 'free selection' of employees by the companies, and the inclusion of a clause providing for written notice by the

Union where a selected member was not in good standing. I cannot agree.

"The pertinent portions of the contract, as set forth in the Trial Examiner's Report, do not, by name refer to the establishment of a hiring hall for the employment of radio officers. To this extent the argument of the majority is well taken. In its previous decisions dealing with 'hiring halls' in the maritime industry, however, the Board has [fol. 90] never made such a condition prerequisite to finding the existence of such systems, and has, indeed, recognized the existence of hiring halls where the contracts did not establish them in name. Nor does the reservation of a right of free selection by the companies necessarily controvert the existence of a hiring hall. While the inclusion of this clause, as argued by the Trial Examiner and the majority of the Board, conceivably negates the inference that a hiring hall was created by the contract, it is equally interpretable as merely protecting the right of the companies to reject unsuitable applicants for radio officer positions.

As the Trial Examiner, at the hearing, excluded oral evidence as to the meaning of this term, among others, as interpreted by the parties, the precise effect of the language cannot be determined. On the other hand, the incontrovertible fact is that such 'free selection' considered granted in the contract by my colleagues, was never utilized by the companies to that effect, nor was there any attempt to do so. Its abstract existence is accordingly rebutted by the realities of the factual situation before us. Furthermore, the requirement of 'clearance' by the Respondent, a term the parties clearly indicated to be of special weight, before a free selection of applicants could be effected, is incompatible with the meaning attributed to the latter clause by the majority opinion. Finally, the reasoning of my colleagues that no occasion for written notice by the Respondent that any particular employee was not in good standing would arise unless the Company hired radio officers directly, misreads the clause in question.²

² Mr. Murdock's footnote here reads as follows: "This clause does not refer to hiring alone, but also contemplates action taken in transferring or promoting employees. In these instances, it is clear, there would be ample reason

[fol.91] "Upon the entire record, and in view of the foregoing, I am persuaded and would find that a lawful hiring hall was established by the contract in question. Accordingly, as the actions of the Respondent herein were in accord with that contract, I would dismiss the complaint in its entirety."

His final statement is an argument that even if the contract were to be otherwise construed, the Respondent was not guilty of infringement of the Act with respect to the refusal to clear Fowler on February 27, because there was no clear showing beyond mere supposition that it had not complied with or had ignored its own rules of procedure. There was "a complete lack of protest by Fowler" at that time and reliance upon this ground forces the Board "into the new and untenable position of becoming the arbiter of proper observance of intraunion procedure."

Quite generally in labor disputes we see some indications of a history and an impact of personalities, surroundings, and local conditions, which, however, are at best only imperfectly translatable to the formal record. Because of this I have wished to trust as much as possible to not only the Board's greater "expertise" in the circumstances, but also its intuitive appreciation of the impelling force of the local background with which we are not acquainted. Here one senses that more background even than usual remains undisclosed, and our understanding of the case by that becomes the more unstable. The proceeding appears atypical; in what are apparently settled and peaceful union relations, the independent worker who attempts to go on his own to secure better individual treatment at the expense of union principles is given the green light by the

for written notice by the Respondent if the recipient of the transfer or promotion was not in good standing. There is, therefore, no reason for assuming that the provision is inconsistent with a hiring hall. Moreover, as the majority opinion admits, the Trial Examiner's conclusion that no occasion for a twenty-four hour notice to the Respondent before the companies hired non-members would arise until, and unless, the companies had first directly and unsuccessfully sought to hire members of the Respondent is clearly erroneous."

[fol. 92] Board for reasons I should think not merely legally inadequate, but also practically inimical to the advancement of peace on this labor front. Perhaps there is some good reason for this; I wish I knew. But on the present record I am constrained to conclude that enforcement should not be had of this Board order.

[fol. 93] IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

No. 22191

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, Respondent

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Swan, Chief Judge, L. Hand and Clark, Circuit
Judges

This cause came on to be heard upon the petition of the National Labor Relations Board (hereinafter referred to as the Board) to enforce its Order dated April 18, 1951. The Court heard argument of respective counsel on February 6, 1952, and has considered the briefs and the transcript of record filed in this cause. On May 6, 1952, the Court, being fully advised in the premises, handed down its decision enforcing the Board's said Order. In conformity therewith, it is hereby

Ordered, adjudged and decreed that the Respondent, The Radio Officers' Union of the Commercial Telegraphers Union, AFL, and its agents shall: 1. Cease and desist from:

(a) Causing or attempting to cause A. H. Bull Steamship Company, its successors and assigns, to discriminate against Willard Christian Fowler or any other employee in violation of Section 8 (a) (3) of the National Labor Relations Act, as amended;

(b) Restraining or coercing employees or prospective employees of A. H. Bull Steamship Company, its successors and assigns, in the exercise of their right to refrain from any or all of the concerted activities listed in Section 7 of the National Labor Relations Act, except to the extent that such right may be affected by the proviso to Section 8 (b) (1) (A), or by an agreement requiring membership in the Respondent as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act. [fol. 94] 2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act:

(a) Notify A. H. Bull Steamship Company in writing that it withdraws any objection to the employment of Willard Christian Fowler and requests it to offer him immediate employment;

(b) Notify Willard Christian Fowler that it has advised A. H. Bull Steamship Company that it withdraws its objection to his employment and requests it to offer him immediate employment;

(c) Make whole Willard Christian Fowler in the manner set forth in the section of Intermediate Report of the Trial Examiner of the National Labor Relations Board, dated July 24, 1950, entitled "The Remedy";

(d) Post at its office in New York City copies of the notice attached hereto and marked "Appendix A". Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Second Region (New York, New York), shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(e) Mail to the aforesaid Regional Director for the Second Region signed copies of the notice attached hereto as "Appendix A" for posting, the Employer willing, at the office and docks of A. H. Bull Steamship Company, in places where notices to employees are customarily posted.

Copies of said notice, to be furnished by the said Regional Director for the Second Region, shall, after being signed as provided in paragraph 2.(d) above, be forthwith returned to said Regional Director for said posting;
 [fol. 95] (f) Notify the said Regional Director for the Second Region in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply herewith.

Learned Hand, Judge, United States Court of Appeals for the Second Circuit; Thomas W. Swan, Judge, United States Court of Appeals for the Second Circuit.

Filed: May 22, 1952.

[fol. 96]

APPENDIX A

NOTICE

TO ALL MEMBERS OF THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, AND TO ALL EMPLOYEES AND PROSPECTIVE EMPLOYEES OF THE A. H. BULL STEAMSHIP COMPANY

PURSUANT TO
 A DECREE OF THE UNITED STATES COURT OF
 APPEALS ENFORCING AN ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause or attempt to cause A. H. Bull Steamship Company or its successors and assigns, to discriminate against Willard Christian Fowler or any other employee or prospective employee in violation of Section 8 (a) (3) of the Act.

We Will Not restrain or coerce employees or prospective employees of the A. H. Bull Steamship Company, its successors or assigns, in their exercise of the right to refrain from any or all of the concerted activities listed in Section 7 of the Act, except to the extent that such right may be affected by the proviso

in Section 8 (b) (1) (A) of the Act, or by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will notify in writing the A. H. Bull Steamship Company that we withdraw our objections to the employment by it of Willard Christian Fowler and request it to offer him employment as a radio officer.

We Will notify Willard Christian Fowler that we have advised A. H. Bull Steamship Company that we withdraw our objections to his employment and that we request it to offer him employment as a radio officer.

We Will make Willard Christian Fowler whole for any loss of pay suffered by him as the result of our having prevented his hire by A. H. Bull Steamship Company.

The Radio Officers' Union of the Commercial Telegraphers Union, AFL (Union); By — —
(Representative) (Title).

Dated ———.

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by any other material.

[fol. 97] [Endorsed:] United States Court of Appeals, Second Circuit. Filed May 22, 1952. Alexander M. Bell, Clerk.

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

(2732)

[fols. 94-97] SUPREME COURT OF THE UNITED STATES—
OCTOBER TERM, 1952

No. —

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELE-
GRAPHERS' UNION, AFL, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

ORDER STAYING JUDGMENT—June 30, 1952

Upon consideration of the application of counsel for the petitioner,

It is ordered that execution and enforcement of the judgment of the United States Court of Appeals for the Second Circuit be, and the same is hereby, stayed pending the filing and disposition of a petition for writ of certiorari, provided same is filed on or before July 31, 1952.

In the event the petition is filed within the time specified and is granted, then this stay is to continue in effect until the mandate of this Court issues.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 30th day of June, 1952.

[fol. 98] SUPREME COURT OF THE UNITED STATES—OCTOBER
TERM, 1952

[Title omitted]

No. 230

ORDER ALLOWING CERTIORARI—Filed October 20, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5142)